No. 91-881

Supreme Court, U.S.
FILED
MAY 26 1992
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MOBIL OIL CORPORATION, THE RETIREMENT PLAN OF MOBIL OIL CORPORATION, and REX ADAMS,

Petitioners,

—v.—

GERALD W. CHRISTOPHER, CHARLES L. PRUNTY, and BILLY G. TURNER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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May 26, 1992

QUESTIONS PRESENTED

1. Whether, as the Fifth Circuit held, a former employee who retired with a lump-sum payment of all his or her pension benefits and who *is not* a "participant" with standing to sue under the Employee Retirement Income Security Act of 1974 ("ERISA") can establish standing by alleging an ERISA violation "but for which [he or she] would have standing"?

2. Whether, as the Fifth Circuit held, this Court's construction in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), of ERISA § 3(7)'s definition of "participant"—a defined term governing the entire subchapter (including ERISA § 510)—is not "applicable in all cases"?

3. Whether this Court's 1989 *Firestone* decision—which construed ERISA § 3(7)'s definition of "participant" and formulated the test for ERISA standing—was overruled or superseded *sub silentio* by the Court's 1990 decision in *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478 (1990)—which dealt only with ERISA preemption and nowhere cited or discussed *Firestone*, ERISA § 3(7) or ERISA's definition of "participant"?

4. Whether a former employee who retired with a lump-sum payment of all his or her vested pension benefits—and who therefore has no claim to benefits—can satisfy ERISA's "participant" standing requirement by alleging that he or she did not retire voluntarily?

LIST OF PARTIES

Petitioners (defendants-appellees below):

Mobil Oil Corporation, a subsidiary of Mobil Corporation (a publicly held corporation). A list of Mobil Oil Corporation's non-wholly-owned subsidiaries, required by Sup. Ct. R. 29.1, is included in the appendix to this petition [46a].

Retirement Plan of Mobil Oil Corporation

Rex D. Adams (a Vice President of Mobil Corporation)

Respondents (plaintiffs-appellants below):

Gerald W. Christopher

Charles L. Prunty

Billy G. Turner

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No. 91-_____

MOBIL OIL CORPORATION, THE RETIREMENT PLAN OF MOBIL OIL CORPORATION, and REX ADAMS,

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GERALD W. CHRISTOPHER, CHARLES L. PRUNTY, and BILLY G. TURNER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners Mobil Oil Corporation, the Retirement Plan of Mobil Oil Corporation (the "Plan") and Rex Adams (collectively, "Mobil") petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The Fifth Circuit's opinion is reported at 950 F.2d 1209 (5th Cir. 1992) and is reprinted in the appendix at 1a-27a.

The orders of the United States District Court for the Eastern District of Texas (Schell, J.) have not been reported. They are reprinted in the appendix at 28a-31a.

JURISDICTION

The Fifth Circuit's judgment was entered on January 24, 1992. Petitioners and respondents all petitioned for panel rehearing, which was denied on February 24, 1992. [32a-35a.] This petition has been filed within 90 days of the denial of rehearing.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This petition involves §§ 3(7), 502 and 510 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1002(7), 1132 and 1140. These provisions are reprinted in the appendix at 36a-45a.

STATEMENT OF THE CASE

The issue in this case is whether three former Mobil employees—each of whom retired in 1984 and received a lump-sum payment of all his retirement benefits under Mobil's Retirement Plan—have standing to sue as "participants" under ERISA. ERISA § 3(7) defines a "participant" as "any employee or former employee . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan . . . ."

A. Factual Background

Mobil provides retirement benefits to its employees through a defined-benefit Retirement Plan, which promises retirees a pension based on their years of service and salary history with the company. The normal form of pension under the Plan has always been an annuity.

In 1977, Mobil amended the Plan to add a lump-sum option, which enabled certain retiring employees to receive the actuarial equivalent of their annuity in a single lump-sum payment, discounted to present value based on an assumed 5% interest rate. To be eligible to elect the lump-sum option, a retiring employee had to have either an accrued lump-sum pension benefit or a net worth (not counting the pension) of at least $250,000.

In February and June 1984, Mobil amended the Plan's lump-sum option by (a) increasing the lump-sum interest-rate assumption from 5% to 9.5% for years of service after the amendments became applicable, (b) increasing the lump-sum eligibility threshold from $250,000 to $450,000 (the projected equivalent in 1985 dollars of $250,000 in 1977 dollars), and (c) indexing the new eligibility threshold to the Consumer Price Index for future years.

These changes applied to all employees retiring on or after February 1, 1985. Mobil announced the amendments on July 2, 1984, creating a six-month notice or "window" period during which employees who already were eligible to retire with lump-sum pensions under the $250,000 threshold could either (a) retire under the "old" Plan by January 1, 1985 or (b) continue working as long as they wished under the "new" Plan.

Mobil requested a determination from the Internal Revenue Service (the "IRS") that the Plan, as amended,

continued to meet the Internal Revenue Code's criteria for favorable tax treatment, including the requirement that tax-qualified plans not "discriminate in favor of highly compensated employees," 26 U.S.C. § 401(a)(4). In late September 1984, the IRS agent reviewing Mobil's application expressed a concern that the amended Plan might result in benefits favoring highly compensated employees.

At the agent's suggestion, Mobil submitted an additional amendment that would allow Mobil, "in its sole discretion, [to] waive [the $450,000 eligibility test] in individual cases for valid cause shown, under the claim and appeal procedures of the Plan." The IRS issued a favorable determination letter on November 23, 1984, contingent on Mobil's adoption of the "waiver" provision.

Mobil announced the IRS approval to its employees on December 21, 1984. It did not disseminate the terms of the waiver provision until October 1985, after the window period had ended.

Respondents Gerald W. Christopher, Charles L. Prunty and Billy G. Turner ("plaintiffs") were among an alleged 1,100 Mobil employees who elected to retire during the window period and who now claim they would not otherwise have done so. Plaintiffs commenced this action on July 7, 1989, asserting that Mobil's conduct in amending the Plan and in allegedly withholding purportedly material information about the waiver provision and other matters had constructively "discharged" them in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621

et seq., and state law. They invoked jurisdiction under ADEA and 28 U.S.C. § 1332.[1]

The complaint also alleged that, if plaintiffs' state-law claims were preempted by ERISA, then Mobil's conduct violated ERISA. An exhibit to the complaint—a letter from plaintiffs' lawyer to Mobil—showed that plaintiffs alleged a violation of ERISA § 510.[2]

Plaintiffs sought the salary and employment benefits they allegedly would have received had they not retired as of January 1, 1985. Plaintiffs also requested reinstatement under ADEA. [5a.]

Mobil filed dispositive motions on plaintiffs' various claims. As to the ERISA claim, Mobil contended that plaintiffs lacked standing to sue as "participants" under ERISA § 502(a) and *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117-18 (1989), because (a) they had retired with lump-sum payments of all their benefits

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1 Three other suits arising out of the 1984 Plan amendments are currently pending against Mobil: a companion case to this action in the Eastern District of Texas; a class action asserting ADEA and ERISA claims in the District of Colorado; and a putative class action asserting state-law claims in state court in Colorado.

A fourth action—the first case filed—resulted in an ADEA and ERISA judgment against Mobil. The Tenth Circuit reversed that judgment on all claims. *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463 (10th Cir.), *cert. denied*, 111 S. Ct. 252 (1990).

2 ERISA § 510 provides that "[i]t shall be unlawful for any person to *discharge*, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan [or] this subchapter . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan [or] this subchapter . . . ." 29 U.S.C. § 1140 (emphasis added).

under the Plan and (b) they did not have a reasonable expectation of returning to their jobs or of fulfilling future eligibility requirements for benefits.

B. Decisions Below

On June 22, 1990, the district court granted summary judgment for Mobil on the ADEA claims, holding them barred by statutes of limitations. [30a-31a.] The court also dismissed the state-law claims based on ERISA preemption and ruled that plaintiffs did not have standing to sue as "participants" under ERISA § 502(a). [28a-29a.]

The Fifth Circuit affirmed the ADEA limitations and ERISA preemption rulings but reversed and remanded the dismissal of plaintiffs' contingent ERISA claims. [1a-27a.] The court held that the district court's dismissal of the ERISA claims on the pleadings was "premature" [26a] because "whether a plaintiff has standing to assert ERISA rights may depend upon whether he can establish a discharge or some other conduct in violation of ERISA, *but for* which he *would have* standing" [24a (emphasis added)].

The Fifth Circuit did not conclude that plaintiffs *are* in fact "participants" under ERISA. Instead, it noted that plaintiffs' allegations "do at least suggest an assertion that they were constructively discharged in violation of [ERISA] section 510 and that *but for* Mobil's nondisclosure they *would be* covered employees with standing to challenge the plan amendment." [26a (emphasis added).]

REASONS FOR GRANTING THE WRIT

In direct conflict with this Court's recent *Firestone* decision and ERISA's unambiguous language, the Fifth Circuit has adopted an ERISA standing analysis based on the same type of test this Court rejected in *Firestone*. The Fifth Circuit's approach could allow former employees who have received all their promised benefits and who *are not* "participants" (because they are not entitled to any additional benefits and do not have a reasonable expectation of returning to covered employment or of fulfilling eligibility requirements in the future) to sue former employers and benefit plans for damages by claiming that they *would have been* "participants" "but for" the defendants' alleged misconduct.

This judicial rewriting of the statutory language threatens to expand significantly the class of persons empowered to sue under ERISA. It also upsets the comprehensive and exclusive remedial scheme that Congress created, and it exposes employers and benefit plans to unpredictable—and potentially severe—liability that would undermine ERISA's purpose.

I.

The Fifth Circuit's "But-For" Standing Analysis Contravenes ERISA's Express Statutory Definition of "Participant" and Rejects this Court's Decision in *Firestone*.

A. ERISA's Definition and *Firestone* Limit the Scope of "Participant."

A person wishing to recover benefits or to enforce statutory rights under ERISA—including § 510—must sue under the statute's jurisdictional provision, ERISA § 502. ERISA § 510 itself states that "[t]he provisions

of [ERISA § 502] are applicable in the enforcement of this section."

Section 502(a) authorizes only plan "participants," "beneficiaries," "fiduciaries" and the Secretary of Labor to bring civil actions under ERISA. Plaintiffs here do not contend they have standing as anything other than "participants."

ERISA § 3(7) defines a "participant" as "any employee or former employee . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan . . . ." ERISA § 3(7).

A participant therefore must (*i*) be a present or former employee *and* (*ii*) be presently or potentially "eligible to receive a benefit" from an employee-benefit plan.

In *Firestone*, this Court construed both aspects of ERISA § 3(7)'s definition of "participant."

The Court held that "former employees" can sue as "participants" if they " 'have . . . a reasonable expectation of returning to covered employment' or . . . have 'a colorable claim' to vested benefits." 489 U.S. at 117 (quoting *Kuntz v. Reese*, 785 F.2d 1410, 1411 (9th Cir.) (per curiam), *cert. denied*, 479 U.S. 916 (1986)).

The Court also ruled that, "[i]n order to establish that he or she 'may become eligible' for benefits, a claimant must have a colorable claim that (1) he or she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future." 489 U.S. at 117-18.

> "This view attributes conventional meanings to the statutory language since all employees in covered employment and former employees with a colorable

> claim to vested benefits 'may become eligible.' A former employee who has neither a reasonable expectation of returning to covered employment nor a colorable claim to vested benefits, however, simply does not fit within the [phrase] 'may become eligible.' "

489 U.S. at 118 (quoting *Saladino v. I.L.G.W.U. Nat'l Retirement Fund*, 754 F.2d 473, 476 (2d Cir. 1985)).[3]

Based on this construction of ERISA § 3(7), *Firestone* reversed the court of appeals' interpretation of "participant" as " ' "*someone who claims to be* a participant or beneficiary" ' "—because this reading "strays far from the statutory language." 489 U.S. at 117 (emphasis in original).

> To say that a "participant" is any person who claims to be one begs the question of who *is* a "participant" and renders the definition set forth in § 1002(7) superfluous.

Id. (emphasis added).

B. The Plaintiffs Are Not "Participants."

The three plaintiffs here are not ERISA "participants" because they do not meet either prong of *Firestone*'s construction of that defined term.

The Fifth Circuit acknowledged that plaintiffs are not presently eligible for benefits and do not have " 'a col-

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3 Although *Firestone* involved a claim under ERISA § 502(c), rather than § 502(a), "participant" is a defined term governing the entire subchapter. *See* ERISA § 3(7). This Court's holding also relied on the "natural reading" and " 'conventional meaning[ ]' " of § 3(7)'s language, 489 U.S. at 116-17, and the Court considered the appropriateness of different possible constructions of "participant" in light of the term's use in § 502(a), *see id.*

orable claim' to vested benefits," *Firestone*, 489 U.S. at 117, because they "received in a lump sum benefits that were concededly all to which they were entitled under a plan as it existed at their retirement" [21a].

Plaintiffs also cannot satisfy the alternative requirement, because they do not have " 'a reasonable expectation of returning to covered employment,' " *Firestone*, 489 U.S. at 117.

First, at no time before filing their complaint did plaintiffs ever ask Mobil to rehire them. A lawsuit by someone who retired years earlier and who later seeks *judicial* reinstatement is not a request to be rehired. *See Winchester v. Pension Committee of Michael Reese Health Plan, Inc.*, 942 F.2d 1190, 1193 (7th Cir. 1991) (plaintiff asserting ERISA claim may not "harbor a 'reasonable expectation of returning to covered employment' " based on discrimination suit requesting reinstatement); *see also Firestone*, 489 U.S. at 119 (Scalia, J., concurring) (the phrase "may become eligible" in ERISA's definition of "participant" "has nothing to do with the probabilities of winning a suit"); *Gardner v. Container Corp. of Am.*, No. 88 C 1824, 1990 U.S. Dist. Lexis 15467 (N.D. Ill. Nov. 15, 1990) (relying on Justice Scalia's *Firestone* concurrence).

Second, even if plaintiffs' prayer for judicial reinstatement could by itself create " 'a reasonable expectation of returning to covered employment,' " *Firestone*, 489 U.S. at 117, plaintiffs still would not be persons who "may become eligible to receive a benefit" from Mobil's Plan, as ERISA § 3(7) requires:

- They do not have "a colorable claim that [they] will prevail in a suit for benefits," *Firestone*, 489 U.S. at 117—because they received all their

benefits in a lump sum when they retired, as the Fifth Circuit recognized [21a]; and

- They do not have "a colorable claim that . . . eligibility requirements will be fulfilled in the future," *Firestone*, 489 U.S. at 117-18—because they had *already* fulfilled those requirements by the time they retired and received their fully vested pensions.

In another case arising out of the same Plan amendments at issue here, the Tenth Circuit ruled that a former employee who—like plaintiffs here—received a lump-sum payment of all his pension benefits and never asked Mobil to rehire him was not a "participant" entitled to sue under ERISA. *Mitchell v. Mobil Oil Corp.*, 896 F.2d at 473-74.[4]

A Department of Labor regulation likewise provides that "[a]n individual is not a participant covered under an employee pension plan . . . if . . . [t]he individual has received from the plan a lump-sum distribution or a series of distributions of cash or other property which represents the balance of his or her credit under the

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4 *Accord Winchester v. Pension Committee of Michael Reese Health Plan, Inc.*, 942 F.2d at 1192-93; *Teagardener v. Republic-Franklin Inc. Pension Plan*, 909 F.2d 947, 952-53 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 678 (1991); *Clark v. Superior Ct. for Dist. of Columbia*, 905 F.2d 389, 389 (D.C. Cir. 1990); *Kuntz v. Reese*, 785 F.2d at 1411-12; *Rhee v. Witco Corp.*, 762 F. Supp. 211, 213-14 (N.D. Ill. 1991); *Dick v. Haas-Wilkerson, Wohlberg*, No. 88-2017-0, 1990 U.S. Dist. Lexis 3416 (D. Kan. March 22, 1990); *Buchanan v. J.R. Foster Elec. Co.*, No. 89 C 4711, 1989 U.S. Dist. Lexis 15189 (N.D. Ill. Dec. 20, 1989); *McFarland v. Yegen*, 12 Employee Benefits Cas. (BNA) 1067, 1071-72 (D.N.J. Oct. 6, 1989); *Vilas v. Lyons*, 702 F. Supp. 555, 562 (D. Md. 1988); *Gilquist v. Becklin*, 675 F. Supp. 1168, 1170-71 (D. Minn. 1987), *aff'd mem.*, 871 F.2d 1093 (8th Cir. 1988).

plan." 29 C.F.R. § 2510.3-3(d)(2)(ii)(B). This construction of ERISA is entitled to special deference because the Department of Labor is one of the agencies charged with enforcing that statute. *See Mead Corp. v. Tilley*, 490 U.S. 714, 722, 726 (1989).

C. The Fifth Circuit Has Impermissibly Expanded *Firestone*'s Construction of "Participant."

In allowing plaintiffs to try to establish ERISA standing, the Fifth Circuit did not hold that plaintiffs *are* or might be "participants" under *Firestone*'s construction of ERISA § 3(7).

First, the court recognized—as did the Tenth Circuit in *Mitchell*—that plaintiffs did not have "a colorable claim for vested benefits" [21a]; *accord Mitchell*, 896 F.2d at 474.

Second, the Fifth Circuit did not conclude that plaintiffs had "a reasonable expectation of returning to covered employment" [21a, 22a-23a]. The court noted that plaintiffs had requested judicial reinstatement on their ADEA claim,[5] but it also observed that,

> [i]t would be unusual if [plaintiffs'] ability to assert a claim at all turned on whether or not [their] requested relief included reinstatement; it would seem more logical to say that but for the employer's

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5 To the extent the Fifth Circuit gave any weight to the complaint's request for judicial reinstatement, one court has already disagreed with that approach. *Shawley v. Bethlehem Steel Corp.*, 784 F. Supp. 1200, 1205-06 (W.D. Pa. 1992) (criticizing *Christopher* and holding that *Winchester v. Pension Committee of Michael Reese Health Plan*, 942 F.2d at 1193, "reflects the better reasoning" that a claim for judicial reinstatement cannot create standing; "the Fifth Circuit used the 'standing is based on a claim of standing' approach specifically rejected by the Supreme Court in *Firestone*").

> conduct alleged to be in violation of ERISA, the employee *would* be a current employee with a reasonable expectation of receiving benefits . . . . [22a-23a (emphasis in original).]

The court therefore did not determine that plaintiffs came within *Firestone*'s definition of "participant." Instead, it held that (*i*) *Firestone*'s construction of that defined term is not "applicable in all cases" [22a], and (*ii*) plaintiffs could establish standing by claiming that they "*would have [had]* standing" or "*would be* covered employees with standing" "but for" their former employer's alleged ERISA violation [24a, 26a (emphasis added)]—even if they *are not* currently "participants."

This "but-for" standing analysis, like the one this Court rejected in *Firestone*, "strays far from the statutory language" and "begs the question of who *is* a 'participant,' " *Firestone*, 489 U.S. at 117 (emphasis added).

A person either *is* or *is not* a "participant." A person cannot become a "participant" merely by *claiming* that he or she is or *would have been* one. *Firestone*, 489 U.S. at 117.

As the Fourth Circuit has stated in rejecting this "but for" approach to ERISA standing, "[t]he effect of reading in a 'but for' test is to impose participant status on every single employee who *but for* some future contingency may become eligible. Neither caselaw nor other provision of ERISA supports such a reading of 'participant.' " *Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 435 (4th Cir. 1986); *see also Freeman v. Jacques Orthopaedic & Joint Implant Surgery Medical Group, Inc.*, 721 F.2d 654, 655-56 (9th Cir. 1983) (nonparticipant

cannot become a "participant" by alleging he would have been one but for defendant's misrepresentation).[6]

The Fifth Circuit's decision not only disregards *Firestone*'s construction of "participant"; it also conflicts with the Tenth Circuit's *Mitchell* decision, the Department of Labor's regulation defining "participant," the Fourth and Ninth Circuits' opinions in *Stanton* and *Freeman*, and the Seventh Circuit's *Winchester* decision (to the extent the Fifth Circuit actually relied on plaintiffs' prayer for judicial reinstatement).

D. *Ingersoll-Rand* Did Not Alter *Firestone* or ERISA's Definition of "Participant."

The Fifth Circuit's conclusion that *Firestone*'s 1989 construction of ERISA § 3(7) was not "applicable in all cases" was based in large part on this Court's 1990 decision in *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478 (1990). [22a-23a.]

The Court of Appeals' reliance on *Ingersoll-Rand* was misplaced.

First, *Ingersoll-Rand* had nothing to do with ERISA standing. It did not cite or discuss *Firestone* or ERISA § 3(7)'s definition of "participant." It dealt only with ERISA's preemption of state-law claims—and it pointed out that preemption does not depend on the existence of an ERISA cause of action. 111 S. Ct. at 486.

Second, *Ingersoll-Rand* held that "Congress intended § 502(a) to be the *exclusive* remedy for rights guaranteed under ERISA, *including those provided by § 510*," 111

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6 The Fifth Circuit relied on the Third Circuit's "but for" test of standing in *Saporito v. Combustion Eng'g Inc.*, 843 F.2d 666, 671 (3d Cir. 1988). [25a n.5.] This Court vacated and remanded *Saporito* in light of *Firestone*. 489 U.S. 1049 (1989).

S. Ct. at 485 (emphasis added). And § 510 itself states that "[t]he provisions of section [502] of this title shall be applicable in the enforcement of this section." Contrary to the Fifth Circuit's analysis [22a-25a], there is no justification for crafting a special construction of "participant" for § 510 cases. *Cf. Ingersoll-Rand*, 111 S. Ct. at 485 (" ' "The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." ' ") (citations omitted).

Third, *Ingersoll-Rand* is consistent with *Firestone*. *If* the Fifth Circuit is correct that this Court considered ERISA standing and implicitly held in *Ingersoll-Rand* that the plaintiff (McClendon) would have been able to sue as an ERISA "participant" [22a], McClendon would fit within *Firestone*'s construction of that term.

McClendon claimed he had been fired to prevent his pension from vesting. By alleging that (a) he was fired in violation of ERISA § 510 and (b) his benefits otherwise would have vested, he could establish " 'a colorable claim' to vested benefits," *Firestone*, 489 U.S. at 117. He also could fit within the second prong of *Firestone*'s definition because he had "a colorable claim" that "eligibility requirements" for the vesting of his pension would "be fulfilled in the future" if he returned to covered employment, *Firestone*, 489 U.S. at 117-18.[7]

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7 *Berger v. Edgewater Steel Co.*, 911 F.2d 911, 921-22 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 1310 (1991), on which the Fifth Circuit also relied [24a-25a], is similarly consistent with *Firestone*—and inapplicable here. The *Berger* plaintiffs all were denied "70/80" retirement benefits, 911 F.2d at 915; they therefore could allege a colorable claim to withheld benefits.

(footnote continued)

The Fifth Circuit therefore had no reason to believe that *Ingersoll-Rand* tacitly overruled or modified *Firestone* or redefined ERISA's definition of "participant"—even in ERISA § 510 cases.

II.

The Fifth Circuit's Standing Analysis Undermines ERISA's Purpose of Protecting Employees' Pension Rights, Upsets ERISA's Careful Balance Between Benefit Rights and Plan Costs, and Imposes Unpredictable and Potentially Serious Costs on Employers and Employee-Benefit Plans.

A. ERISA Was Designed to Protect Employees' *Benefits*.

The Court has held that "ERISA was enacted 'to promote the interests of employees and their beneficiaries in employee benefit plans,' . . . and 'to protect contractually defined *benefits* . . . .' " *Firestone*, 489 U.S. at 113 (citations omitted) (emphasis added); *cf. Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 144, 148 (1985) (no extracontractual damages available under ERISA §§ 409 and 502(a)(2)).

The benefits that ERISA protects are those an employee or former employee has accrued through his or her employment. Once an employee has retired and has been paid all those benefits, ERISA does not give him or her a right to sue for *damages* based on years he or she never actually worked.

They also could allege they might have been able to fulfill eligibility requirements for those benefits in the future by returning to covered employment.

> Rather than enabling employees to get 'something for nothing'—i.e. to receive present benefits for anticipated future years of employment which have not actually been and may never be worked— . . . the essential purpose of ERISA is to prevent employees from getting 'nothing for something'—to prevent them from receiving fewer benefits than those they accrue through years of service.

Blessitt v. Retirement Plan for Employees of Dixie Engine Co., 848 F.2d 1164, 1176 (11th Cir. 1988) (en banc); *accord West v. Greyhound Corp.*, 813 F.2d 951, 955 (9th Cir. 1987) ("an employee has no ERISA right to future, unaccrued benefits").

It is because of ERISA's focus on *benefits* that ERISA §§ 3(7) and 502(a) restrict "participant" standing to present and former employees who "may become eligible to receive a *benefit*," 29 U.S.C. § 1002(7) (emphasis added).[8]

Section 510 is consistent with this limited definition of "participant." "Congress viewed [§ 510] as a crucial part of ERISA because, without it, employers would be able to circumvent the provision of promised *benefits*." *Ingersoll-Rand*, 111 S. Ct. at 485 (emphasis added). Congress did not intend to grant a § 510 cause of action to persons whose interests are not protected by ERISA and who therefore do not have statutory standing.

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8 In contrast to participants, the Secretary of Labor does not sue to recover benefits or to enforce the terms of a benefit plan. *Compare* ERISA § 502(a)(1)(B) *and* § 502(a)(3)(A) *with* ERISA § 502(a)(5). Instead, the Secretary has broad authority to enforce the terms of the statute itself—including § 510. *See* ERISA § 502(a)(5). ERISA § 502(h) therefore requires any participant, beneficiary or fiduciary bringing an action other than one "which is solely for the purpose of recovering benefits due such participant[ ] under the terms of the plan" to serve a copy of his or her complaint on the Secretary of Labor and the Secretary of the Treasury.

B. The Fifth Circuit's Decision Upsets the Balance Congress Struck Between Benefits Protection and the Costs of Plan Creation and Maintenance.

In enacting ERISA, Congress realized that the potential costs of operating benefit plans under a voluntary system would be an important factor in employers' decisions about whether to adopt or maintain such plans and about what level of benefits (if any) to provide. *See, e.g.*, H.R. Rep. No. 90-807, *reprinted in* 1974 U.S.C.C.A.N. 4670, 4682; *see also Hlinka v. Bethlehem Steel Corp.*, 863 F.2d 279, 283 (3d Cir. 1988) ("The pension scheme as originally conceived by Congress and enforced by ERISA is essentially voluntary. ERISA nowhere mandates the institution of a pension program or the right to a pension.").

Because of Congress' desire to encourage the formation and maintenance of these voluntary plans, "all of the provisions of the Act [were] analyzed on the basis of their projected costs [to the employer and the plan] in relation to the anticipated benefit to the employee participant." H.R. Rep. No. 93-533, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4639-40; *cf. Holliday v. Xerox Corp.*, 732 F.2d 548, 550 (6th Cir.), *cert. denied*, 469 U.S. 917 (1984) ("recognizing that pension plans are voluntarily created by employers, Congress intended to 'avoid making these standards so tough that they will actually discourage the creation of new pension plans' ") (quoting 119 Cong. Rec. 30,041 (1973) (remarks of Senator Bentsen)).

Section 502(a)'s "comprehensive" and "exclusive" remedial scheme—which allows only participants, beneficiaries, fiduciaries and the Secretary of Labor to bring civil actions—is an essential part of this cost-benefit equation and "represents a careful balancing of the need for prompt and fair claims settlement procedures against

the public interest in encouraging the formation of employee benefit plans." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987).

The Fifth Circuit's expansion of ERISA § 502(a) remedies beyond those prescribed in the statute upsets the balance Congress struck between the costs and benefits of pension plans. Destruction of this balance threatens to increase benefit plans' and employers' financial liability—and therefore to reduce the pension rights available to current and future participants and beneficiaries.

First, the Fifth Circuit's "but for" test—which could grant § 502(a) standing to plaintiffs who *are* not "participants"—exposes plans and employers to unpredictable and potentially substantial damages claims by persons without even a colorable claim to benefits.

Second, the open-ended exception to the "participant" requirement creates costly uncertainties about the scope of a plan's (or an employer's) obligations to former employees.

"The term participant is of considerable importance within ERISA's statutory scheme because numerous rights under that scheme are limited to those who are included within that term." *Saladino v. I.L.G.W.U. Nat'l Retirement Fund*, 754 F.2d at 476.

For example, "participants" are entitled to receive and request various plan documents, *see* ERISA § 104, 29 U.S.C. § 1024, and to obtain penalties if requested documents are not provided, *see* ERISA § 502(c). Participants are also owed certain fiduciary duties. ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1).

One congressional goal in ERISA was to "help administrators, fiduciaries and participants to predict

the legality of proposed actions." H.R. Rep. No. 93-533, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4650; S. Rep. No. 93-127, *reprinted in* 1974 U.S.C.C.A.N. 4838, 4865.

Under the Fifth Circuit's "but-for" standing doctrine, however, a plan would no longer be able to predict its legal obligations to former employees, because those obligations might turn on unforeseeable allegations as to the "voluntariness" of former employees' retirements and other hypothetical "but for" theories—which would have to be taken as true for purposes of a motion to dismiss for lack of standing, *see Warth v. Seldin*, 422 U.S. 490, 501 (1975).

To avoid potentially costly litigation by persons who claim—counterfactually—that they *would have been* "participants," plans would be forced to bear the costs of treating former employees as full-fledged participants even where those persons have no colorable claim to benefits and no reasonable expectation of returning to covered employment to fulfill future eligibility requirements for benefits. *Cf. Firestone*, 489 U.S. at 118 (where there is any doubt as to whether claimant is a participant, plan administrators and fiduciaries will provide plan documents to avoid ERISA penalties).[9]

These added costs would "reduce the amounts available to actual beneficiaries of plans for no statutory purpose," *Saladino v. I.L.G.W.U. Nat'l Retirement Fund*,

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9 ERISA cases constitute a substantial—and increasing—portion of the federal courts' dockets. In the 12-month periods ending June 30, 1990 and 1991, the number of new ERISA actions rose 13.7%: from 8,441 to 9,595. Virtually all of those cases were private civil actions. ERISA cases accounted for 3.9% and 4.6% of all civil actions commenced during those two periods. 1991 Admin. Office of U.S. Courts Annual Report at 191.

754 F.2d at 476—and, especially in the case of defined-benefit plans (such as Mobil's), would also impose additional costs on employers and plan settlors, thus discouraging plan formation or maintenance.

Unless this Court grants review, the uncertainties created by the Fifth Circuit's ruling could affect plans throughout the country. Under ERISA's broad venue provision, § 502(e)(2), 29 U.S.C. § 1132(e)(2), any plan or employer over which a court in the Fifth Circuit could exercise personal jurisdiction might become liable to former employees under Fifth Circuit law, regardless of where the plan is administered or whether it covers persons or facilities within the Fifth Circuit, and regardless of where the employer is located. *See, e.g., Varsic v. United States Dist. Ct. for Central Dist. of Cal.*, 607 F.2d 245, 247-50 (9th Cir. 1979); *Nieves v. Houston Indus., Inc.*, 771 F. Supp. 159, 161 (M.D. La. 1991).

ERISA's goal was to provide a *uniform* body of federal law governing benefit plans to avoid the inefficiencies—and consequent reduction in plan benefits—that would result from conflicting and inconsistent regulatory schemes. *See Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 8-11 (1986); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 105 & n.25 (1983).

By exposing plans and employers to unpredictable and potentially substantial liabilities to former employees to whom they owe no statutory duty under ERISA, the Fifth Circuit's ruling creates an uncertain and inconsistent legal environment for plans and employers—particularly in light of the Fourth, Seventh, Ninth and Tenth Circuits' contrary decisions, *see* section I.C., *supra*. It is therefore imperative that this Court address the scope of former employees' standing and the exception that the Fifth Circuit has created to ERISA's statutory standing requirements.

CONCLUSION

The petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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May 26, 1992

APPENDIX

Opinion of the United States Court of Appeals for the Fifth Circuit, January 24, 1992

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 90-4562

Jan. 24, 1992

GERALD W. CHRISTOPHER, Charles L. Prunty, and Billy G. Turner,

Plaintiffs-Appellants,

—v.—

MOBIL OIL CORPORATION, Retirement Plan of Mobil Oil Corporation and Rex Adams,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

B e f o r e :

HENLEY,* KING, and GARWOOD,
Circuit Judges.

GARWOOD, *Circuit Judge*:

Appellants brought claims under the Age Discrimination in Employment Act (ADEA) and the Employee Retirement Income Security Act (ERISA), as well as

* Circuit Judge of the Eighth Circuit, sitting by designation.

various common-law claims including fraud, civil conspiracy, and breach of the employment contract, against their former employer Mobil Oil Corporation, based on Mobil's 1984 amendment of its employee benefit plan and alleged failure to disclose to appellants all of the options available under the amended plan. The district court granted Mobil's motion for summary judgment on the ADEA claims on the grounds that the claims were time-barred and that as a matter of law appellants were not constructively discharged in violation of ADEA. The district court also granted Mobil's request for judgment on the pleadings on appellants' state law claims on the ground that they were preempted by ERISA, and dismissed the ERISA claims on the ground that because appellants were not participants seeking to recover benefits from a retirement plan, the court lacked jurisdiction over their ERISA claims. We affirm in part and reverse and remand in part.

Facts and Proceedings Below

The following facts are drawn from the parties' submissions of undisputed facts in connection with Mobil's motions for summary judgment, judgment on the pleadings, and dismissal.

Mobil provides retirement benefits for its employees through a defined benefit plan, under which employees receive a pension based on years of service, salary history, and life expectancy. Until 1977, the standard method of receiving these pensions was in the form of an annuity. In that year, however, Mobile [sic] added a lump sum option, enabling certain employees to receive the actuarial equivalent of their annuity, discounted at five percent, in one payment following retirement. To be eligible for the lump sum option, an employee had to have either an accrued lump sum pension benefit, or a

net worth independent of the pension, equal to at least $250,000. Also, the employee was required to be at least fifty-five years old.

On July 2, 1984, Mobil announced changes to the lump sum option of the retirement plan, including (1) an increase in the discount rate from 5% to 9.5%, to operate prospectively, *i.e.*, to be applied to all earnings after January 31, 1985; (2) an increase in the eligibility threshold from $250,000 to $450,000; and (3) a linking of the new threshold to the Consumer Price Index. These changes, which were announced as subject to Internal Revenue Service (IRS) approval, would apply to all employees retiring after January 31, 1985; thus, employees otherwise eligible to retire had a six-month window in which they could retire subject to the lower threshold and lower discount rate. The choice was a significant one for employees who met the $250,000 threshold but who were uncertain ever to meet the indexed $450,000 threshold because, with market interest rates well above 5%, the lump sum pensions were worth 40% more than the annuities. Appellants, Gerald Christopher, Charles Prunty, and Billy Turner, were among the approximately 1,100 Mobil employees who elected to take early retirement during the 6-month window. All three submitted their retirement notices between August and October 1984, and retired as of January 1, 1985.

On July 16, 1984, Mobil sought a determination from the IRS that the plan as amended continued to meet the Internal Revenue Code's requirements for favorable tax treatment, including the requirement that pension plans not "discriminate in favor of highly compensated employees." 26 U.S.C. § 401(a)(4). In meetings in late September 1984, the IRS reviewing agent expressed concern that the amended plan could result in benefits favoring highly compensated employees, and indicated that he might need to seek technical advice from Wash-

ington. In response, Mobil adopted another plan amendment allowing Mobil, in its sole discretion, to waive the eligibility threshold in individual cases for valid cause shown. After insertion of this provision, the IRS issued to Mobil a favorable determination letter on November 23, 1984, noting that continued qualification of the plan would depend upon its effect in operation.

Mobil announced the IRS approval to its employees on December 21, 1984, but did not notify its employees of the waiver provision until well after expiration of the six-month window—October 1985. Because of a 1985 IRS revenue ruling and subsequent pronouncements, Mobil eventually entirely deleted the lump sum eligibility threshold in 1986.

Appellants filed age discrimination charges against Mobil with the Equal Employment Opportunity Commission (EEOC) on March 1, 1989. They alleged that Mobil's conduct in amending the plan and concealing the waiver provision was a concerted scheme to reduce its work force. By purporting to increase the lump sum threshold and concealing its awareness that applicable tax law precluded that action, appellants charged, Mobil induced hundreds of older employees into retirement without the need to pay them an early retirement bonus. The EEOC dismissed the charges as untimely filed. Appellants then commenced this suit on July 7, 1989. They alleged that Mobil's conduct constituted age discrimination in violation of ADEA, 29 U.S.C. §§ 621 *et seq.*, as well as common-law fraud, civil conspiracy, unlawful interference with contract rights, breach of the employment contract, negligence, and gross negligence. In the event that appellants' state law claims were held to be preempted by ERISA, the complaint alleged in brief and conclusory fashion that Mobil's conduct violated ERISA, apparently ERISA § 510, 29 U.S.C. § 1140, prohibiting interference with an employee's

attainment of a right under ERISA. For all claims, appellants sought the wages and employment benefits they would have received had they continued working until normal retirement age. On the ADEA claims, appellants also requested reinstatement.

Mobil moved for summary judgment on the ADEA and state law claims. The district court granted the motion, finding that the ADEA and state law claims were time-barred, that appellants had not been constructively discharged in violation of the ADEA, and that appellants' claims of discrimination arose from changes in fringe benefits available under a bona fide retirement plan, not from discrimination in nonfringe aspects of employment, and thus were not within the purview of the ADEA according to ADEA § 4(f)(2), 29 U.S.C. § 623(f)(2). Simultaneously, Mobil moved for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) on the state law claims on the ground that they were preempted by ERISA, and dismissal under Federal Rules of Civil Procedure 12(b)(1) & (6) of the contingent ERISA claim on the ground that appellants were not "participants" seeking to recover benefits under ERISA § 502, 29 U.S.C. § 1132, depriving the court of jurisdiction. The district court granted this motion as well.

Discussion

I. ADEA Claims

We first examine the district court's grant of summary judgment on the ADEA claims on the ground that they were time-barred. In reviewing a grant of summary judgment, all legitimate factual inferences presented by the record are drawn in favor of the party opposing the motion. *Bozé v. Branstetter*, 912 F.2d 801, 804 (5th Cir.1990) (per curiam). We can uphold the summary

judgment only if our review demonstrates that no genuine issue of material fact remains and that the moving party is entitled to judgment as a matter of law. *Id.*

It is not disputed that the applicable statutes of limitations require an employee to file an age discrimination charge with the EEOC within 300 days after the alleged unlawful practice occurred, 29 U.S.C. § 626(d)(2), and to file a lawsuit within 3 years after the alleged unlawful practice occurred, 29 U.S.C. §§ 255(a), 626(e). Appellants argue, however, that a genuine issue of material fact exists as to when their awareness of the facts constituting the alleged age discrimination was sufficient to commence the running of the limitations period. *See Pruet Production Co. v. Ayles*, 784 F.2d 1275, 1279 (5th Cir.1986) ("[T]he statute does not begin to run until the facts which would support a cause of action are apparent or should be apparent to a person with reasonably prudent regard for his rights." (quoting *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924, 930 (5th Cir.1975))). Specifically, they argue that Mobil's negotiation of a revised plan in October 1984 only came to light in 1988 when counsel for another former employee, Porter Mitchell (Mitchell), suing Mobil in federal district court in Colorado, discovered the correspondence between Mobil and the IRS. It was only when this fact became publicly known at the trial of *Mitchell v. Mobil Oil Corp.* in December 1988,[1] appellants argue,

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1 The alleged fraud was not part of Mitchell's claims against Mobil. He argued, rather, that the plan amendment itself constituted a constructive discharge and was a willful violation of the ADEA. He also argued that Mobil had breached its fiduciary duties under ERISA § 404, 29 U.S.C. § 1104, and had violated ERISA's anti-cutback provision, ERISA § 204(g), 29 U.S.C. § 1054(g), by retroactively limiting his right to the lump sum option, an accrued benefit. The jury found in favor of Mitchell on his ADEA claim and awarded

that they had any reason to know of Mobil's concealment of the waiver option. Appellants' EEOC filing in March 1989 and their commencement of this suit in July 1989 would both have been timely if the statute of limitations had commenced running in December 1988.

Evaluating the appellants' claim that the statute of limitations did not commence until December 1988 requires an analysis of the nature of their ADEA claim. The ADEA forbids an employer to "discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). A "discharge" within the meaning of this section may be constructive if a reasonable person in the employee's position would have felt compelled to resign under the circumstances. *Bodnar v. Synpol, Inc.*, 843 F.2d 190, 192 (5th Cir.), *cert. denied*, 488 U.S. 908, 109 S.Ct. 260, 102 L.Ed.2d 248 (1988). An attractive early retirement offer, however, is not a constructive discharge merely because it creates a strong incentive to retire; an early retirement option can constitute a constructive discharge only if the employee shows that it sufficiently alters the status quo that each choice facing the employee makes him worse off. *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463, 467 (10th Cir.), *cert. denied*, ____ U.S. ____, 111 S.Ct. 252, 112 L.Ed.2d 210 (1990); *Bodnar*, 843 F.2d at 193.

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him damages for back pay, front pay, and lost benefits. The district court held in favor of Mitchell on the ERISA claims as well, awarding him compensatory and liquidated damages. On appeal, the Tenth Circuit reversed, holding that Mitchell had failed to prove that Mobil's proffered justification for the plan amendment was a mere pretext for discrimination, and that Mitchell was not a participant with standing to assert ERISA claims. *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463, 471-74 (10th Cir.), *cert. denied*, ____ U.S. ____, 111 S.Ct. 252, 112 L.Ed.2d 210 (1990).

The gist of appellants' *prima facie* ADEA claim is as follows. The adoption of the 1984 plan amendment presented appellants with a choice between unfavorable options; they faced the choice of retiring within the six-month window or staying on at Mobil but possibly forgoing eligibility for the lump sum payout. Either could be regarded as less favorable than staying on at Mobil until normal retirement age with the assurance of eligibility for the lump sum payout, which was the "status quo" when the amendment was adopted. The asserted discriminatory character of the amendment to the plan arises from the fact that only employees over the age of fifty-five were put to that choice. Employees under fifty-five did not presently qualify for retirement, so although the plan amendment may have defeated an expectation for them, they were not confronted with the possibility of losing a benefit for which they were then qualified. *See Mitchell*, 896 F.2d at 496.

This much of the ADEA theory was evident in July 1984 upon the initial announcement of the plan. The unfavorable choice to which it put "window" employees and its particular impact on employees over fifty-five were both apparent on the face of the plan amendment. Indeed, the theory outlined above was precisely Mitchell's claim against Mobil, accepted by the Tenth Circuit. Mitchell filed a complaint with the EEOC on April 25, 1985, with no knowledge of Mobil's alleged concealment of the waiver provision. Moreover, another employee, Frederic J. Raymond (Raymond), filed a similar charge with the Ohio Civil Rights Commission and the EEOC on May 10, 1985. Therefore, unless appellants can show that Mobil's alleged concealment adds a material element to their ADEA claim, the statute of limitations should have commenced running in July 1984.

Appellants have offered no theory under which the alleged nondisclosure is a necessary element. They refer

us to the Fourth Circuit case of *Stone v. University of Maryland Medical System Corp.*, 855 F.2d 167 (4th Cir. 1988), for their argument that "where, as here, the employee surrenders his job as a proximate result of fraud and deceit by the employer, the voluntariness of the retirement or resignation is fundamentally vitiated." *Stone* is one of a series of cases where resignations have been held to be involuntary based on an employer's misrepresentations about or nondisclosure of an employee's rights. Others include *Covington v. Department of Health and Human Services*, 750 F.2d 937 (Fed.Cir. 1984), and *Scharf v. Department of the Air Force*, 710 F.2d 1572 (Fed.Cir.1983).

We do not believe that these cases avail appellants, however. As appellants' phrasing of their argument reflects, the effect of a showing of fraud in these cases is to render an otherwise voluntary choice involuntary. *Stone* and related cases involve disputes in which public employees were entitled to certain procedural protections if they were to be terminated involuntarily; they were required to show that their retirement was involuntary to invoke the jurisdiction of the Merit Systems Protection Board or to establish a "deprivation" under the due process clause. Here, by contrast, appellants allege a constructive discharge arising from the choice to which they were put by the plan amendment. To further argue that the actual election made was involuntary because it was based on incomplete information would be superfluous; involuntariness is implicit in appellants' argument that they were coerced into early retirement by the threatened removal of the lump sum option. Assuming, *arguendo* only, that appellants' allegations of nondisclosure would serve to estop Mobil from raising in defense the claim that appellants' retirement was voluntary, nevertheless the asserted nondisclosure does not form a material part of appellants' constructive discharge the-

ory that would prevent the statute of limitations from commencing.

Appellants' arguments that this Court should apply equitable tolling or equitable estoppel fail for similar reasons. These doctrines provide for tolling of the statute of limitations when a plaintiff's unawareness of his ability to bring a claim—either unawareness of the facts necessary to support a discrimination charge or unawareness of his legal rights—is due to defendant's misconduct. *See Rhodes v. Guiberson Oil Tools Division*, 927 F.2d 876, 878-79 (5th Cir.), *cert. denied*, ____ U.S. ____, 112 S.Ct. 198, 116 L.Ed.2d 158 (1991); *Kale v. Combined Insurance Co.*, 861 F.2d 746, 752 (1st Cir. 1988). Here, the knowledge allegedly concealed from the employees was that they had a third option—to continue their employment and apply for a waiver from the higher lump sum requirement. Therefore, the facts as known to the employees in 1984 actually gave them a *better* ADEA claim than they would have had with full knowledge. Whatever nondisclosures Mobil is guilty of would not have lulled appellants into postponing assertion of their rights; if anything, it would have made them *more* likely to assert that they were constructively discharged.

Finally, appellants argue that although they knew in 1984 of the plan amendment and retirement window, they were misled into believing that they had no cause of action by Mobil's plausible justifications for its amendment of the plan, *i.e.*, that the threshold was changed to adjust for intervening inflation and that the discount rate was raised to align Mobil's practice with that of its competitors and to more realistically reflect current interest rates. In other words, appellants contend that although the discriminatory *effect* of the amendment was apparent in 1984, it was only upon learning of the concealment of the waiver option that they had rea-

son to believe the plan amendment was actuated by age bias and that the alleged concerted scheme to reduce the work force began to take shape.

We find this argument unpersuasive as well. First, we fail to see how the deception alleged by appellants calls into question Mobil's proffered justifications for the plan amendment. The evidence does not create a genuine dispute as to the factual accuracy of Mobil's proffered justifications. Even if appellants' allegations are true respecting Mobil's having deceived its employees about the validity under applicable tax law of the plan amendment and about the waiver provision, there is no evidence showing that Mobil's announced reasons for the plan amendment were deceptive. This is an issue on which appellants would have had the burden at trial, and they were hence required to meet Mobil's summary judgment motion with summary judgment evidence that would sustain a jury finding in their favor on the issue. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Blumberg v. HCA Management Co., Inc.*, 848 F.2d 642, 644 (5th Cir.1988), *cert. denied*, 488 U.S. 1007, 109 S.Ct. 789, 102 L.Ed.2d 781 (1989).

In any event, a showing of deception as to motive supports equitable estoppel only if it conceals the very fact of discrimination; equitable estoppel is not warranted where an employee is aware of all of the facts constituting discriminatory treatment but lacks direct knowledge of the employer's subjective discriminatory purpose. Thus, where an employee was told that he was being discharged because industry economic downturn required reduction of the work force, and was told that he would be considered for re-hiring, we applied equitable estoppel to hold that limitations on his ADEA claim did not commence until he learned that he had been replaced by a younger employee. *Rhodes*, 927 F.2d at

880-82; *see also Coke v. General Adjustment Bureau, Inc.*, 640 F.2d 584, 595 (5th Cir.1981) (en banc) (employer's misrepresentation that employee would be reinstated induced foreseeable forbearance in filing ADEA claim); *Meyer v. Riegel Products Corp.*, 720 F.2d 303, 307 (3d Cir.1983) (employer's explanation to employee that he was dismissed as part of a reorganization furnished grounds for equitable tolling in an ADEA suit until discharged employee learned that a younger replacement had been hired), *cert. dismissed*, 465 U.S. 1091, 104 S.Ct. 2144, 79 L.Ed.2d 910 (1984). By contrast, where an employee knew that he was discharged and replaced by a younger employee, his allegation that the company concealed from him the true reason for his discharge and that it was not until subsequent hirings that the "pattern of age discrimination" became evidence was held insufficient to support equitable estoppel. *Pruet Production Co.*, 784 F.2d at 1279-80; *accord Chapman v. Homco, Inc.*, 886 F.2d 756, 758 (5th Cir.1989), *cert. denied*, 494 U.S. 1067, 110 S.Ct. 1784, 108 L.Ed.2d 785 (1990); *Blumberg*, 848 F.2d at 645.[2] The showing required for a *prima facie* employment discrimination claim is minimal, *see Pruet Production Co.*, 784 F.2d at 1279, and when "facts that would support a cause of action are or should be apparent," the statute commences even if the employee is not aware of *all* the evidence that he will ultimately rely upon at trial. *Blumberg*, 848 F.2d at 645 (emphasis added). The showing required at the stage of filing charges with the EEOC is even more lenient, because the purpose of the filing is

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2 This view is consistent with this Circuit's rule in Title VII cases that the limitations period starts running when the plaintiff knows of the discriminatory *act*, not when the plaintiff perceives a discriminatory motive behind the act. *See Merrill v. Southern Methodist University*, 806 F.2d 600, 605 (5th Cir.1986).

only to initiate an EEOC investigation. *Pruet Production Co.*, 784 F.2d at 1279.

Applying those principles here, we conclude that whatever concealment Mobil may have been guilty of did not deceive appellants as to the facts of the alleged discrimination. Rather, appellants were able to evaluate the propriety of their alleged constructive discharge for ADEA purposes immediately. Just as in individual discharge cases the *prima facie* showing is only that the employee has been discharged and replaced by a younger worker, leaving exploration of an employer's motives for the EEOC investigation or pretrial discovery, here the appellants' *prima facie* case for constructive discharge was that older employees alone were put to the unfavorable choice of early retirement or loss of the lump sum option. This fact, apparent in July 1984, was sufficient to put appellants on notice of possible age discrimination (as it did other Mobil employees) and to require them to assert their rights.

For these reasons, even accepting for purposes of our review of the summary judgment appellants' charges of nondisclosure, we do not believe that a genuine issue of material fact exists as to when the statute of limitations on the ADEA claims commenced. Concluding that the district court's grant of summary judgment is supported on that ground, we do not reach the district court's further holding that as a matter of law appellants were not constructively discharged in violation of the ADEA.

II. ERISA Preemption of State Law Claims

We next address the district court's grant of judgment on the pleadings on appellants' state law claims. Appellants charged that Mobil's actions in amending the plan and withholding information about the waiver provision fraudulently induced them to surrender their jobs, were taken pursuant to a plan to reduce Mobil's work force,

and breached the duty of good faith and fair dealing owed to appellants by Mobil under their employment contracts. This conduct, appellants alleged, gave rise to claims for fraud, civil conspiracy, breach of the employment contract, unlawful interference with contract rights, negligence, and gross negligence. The district court held these claims were preempted because they "relate to Mobil's Retirement Plan, which is governed by ERISA, and directly overlap with provisions of ERISA." We turn to the first ground relied upon by the district court, namely that appellants' claims "relate to" an ERISA-governed retirement plan.

ERISA's provisions "supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." ERISA § 514(a), 29 U.S.C. § 1144(a). The Supreme Court has consistently emphasized the expansiveness of the "relate to" standard and its purpose of establishing the regulation of pension plans as an exclusively federal concern. *See, e.g., Ingersoll-Rand Co. v. McClendon*, ____ U.S. ____, 111 S.Ct. 478, 482, 112 L.Ed.2d 474 (1990); *FMC Corp. v. Holliday*, ____ U.S. ____, 111 S.Ct. 403, 407, 112 L.Ed.2d 356 (1990); *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549, 1552-53, 95 L.Ed.2d 39 (1987); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S.Ct. 2890, 2899-2901, 77 L.Ed.2d 490 (1983). The words "relate to" are to be given their "broad common-sense meaning," *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 105 S.Ct. 2380, 2389, 85 L.Ed.2d 728 (1985), and a state law will be pre-empted "if it has a connection with or reference to such a plan." *Shaw*, 103 S.Ct. at 2900. This Circuit has held that the fact that a claim sought damages measured by pension benefits sufficed as the requisite "connection" to an employee benefit plan for preemption purposes. *Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290,

1294 (5th Cir.1989). *But see Memorial Hospital System v. Northbrook Life Insurance Co.*, 904 F.2d 236, 247 (5th Cir.1990); *Pizlo v. Bethlehem Steel Corp.*, 884 F.2d 116, 120-21 (4th Cir.1989).

The complaints here focus on Mobil's amendment of an ERISA-governed employee benefit plan and Mobil's disclosure to its employees of the terms of the plan. In addition to calculating their damages by computing lost benefits under the plan, a court adjudicating appellants' claims of a fraudulent scheme to reduce the work force would have to examine, at a minimum, the operation of the plan prior to the amendment, the language of the plan amendments, and Mobil's communication to its employees about the terms of the plan amendments. Given the breadth of the section 514(a) test, we find that these connections are adequate to warrant preemption.

This conclusion is buttressed by decisions of this and other courts addressing claims of fraudulently induced retirement and wrongful termination, which are the crux of appellants' state law claims here. In the closely analogous case of *Lee v. E.I. DuPont de Nemours and Co.*, 894 F.2d 755 (5th Cir.1990), the plaintiffs alleged that they had retired in reliance on their employer's representations that the company was not preparing to adopt an early retirement incentive plan, and they sued their former employer for fraud and negligent misrepresentation in that respect. We held that the claims were preempted under section 514(a). *Id.* at 758; *see also Cefalu*, 871 F.2d at 1295 (breach-of-contract claim for oral misrepresentation that retirement options offered equivalent benefits was preempted); *Degan v. Ford Motor Co.*, 869 F.2d 889, 895 (5th Cir.1989) (claim for breach of an oral agreement to pay early retirement benefits was preempted). In a case almost identical to the present one, the Third Circuit held that where employees alleged that an employer's notification of proposed plan amend-

ments misrepresented to them that they would lose a retirement benefit if they did not retire in a window period before the amendments became applicable, their claims were preempted. *Berger v. Edgewater Steel Co.*, 911 F.2d 911, 923 (3d Cir.1990), *cert. denied*, ____ U.S. ____, 111 S.Ct. 1310, 113 L.Ed.2d 244 (1991).

In addition, the Supreme Court recently spoke decisively to the question whether a tort claim premised on wrongful discharge to prevent vesting of pension benefits could survive independently of ERISA. In *Ingersoll-Rand Co. v. McClendon*, ____ U.S. ____, 111 S.Ct. 478, 483, 112 L.Ed.2d 474 (1990), the Court found that the claim "related to" an ERISA-covered plan under section 514(a). Appellants here seek to distinguish their "wrongful discharge by fraud" claim from the tort claim at issue in *McClendon*. They argue that whereas the existence of a pension plan is a necessary *element* of the cause of action considered in *McClendon* (discharge to prevent vesting of pension benefits), here the pension plan was merely the *subject* of Mobil's fraud. The fraud claim itself, they argue, is conceptually identical to a fraud claim concerning any other subject matter, and ERISA cannot generally preempt state laws prohibiting employers from fraudulently inducing employees to give up their jobs. Appellants rely on *Mackey v. Lanier Collections Agency and Service*, 486 U.S. 825, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988), in which the Court noted that lawsuits based on "run-of-the-mill state-law claims such as unpaid rent, failure to pay creditors, or even torts committed by an ERISA plan" are not preempted merely because the suits are brought against an ERISA plan. *Id.* 108 S.Ct. at 2187.

We do not find this argument persuasive. We have previously noted that preempted state law includes any state law cause of action as it relates to an employee benefit plan, even if it arises under a general law which

in and of itself has no connection to employee benefit plans. *Cefalu*, 871 F.2d at 1292 n. 5. Although there would undoubtedly be cases of fraudulently induced retirement that were not preempted, the specific conduct here, as in *Lee*, *Cefalu*, and *Degan*, relates directly to the operation of an ERISA plan. Superimposing state law fraud standards on the elaborate ERISA provisions governing the content and timing of notice of plan provisions and amendments, *see* ERISA §§ 102, 104(b)(1), 29 U.S.C. §§ 1022, 1024(b), would undercut the goal of uniform national regulation in the manner that section 514(a) seeks to prevent. *See Memorial Hospital System*, 904 F.2d at 245 (observing that preemption is proper where the state law claims address areas of exclusive federal concern, and where they directly affect the relationship among the traditional ERISA entities). In our view, this makes the conduct at issue here a far cry from the "run-of-the-mill" claims alluded to in *Mackey*.[3]

For the same reason, appellants' reliance on *Hartle v. Packard Electric*, 877 F.2d 354 (5th Cir.1989) (per curiam) is misplaced. In *Hartle*, a discharged employee brought suit for wrongful termination and civil conspiracy to unlawfully terminate his employment. Because the general rule in Mississippi was employment at will, he argued that his participation in an employee benefit plan had removed his employment from employment-at-will status and had effectively given him a tenured posi-

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3 Appellants also cite *Greenblatt v. Budd Co.*, 666 F.Supp. 735 (E.D.Pa.1987), which does provide more direct support for their argument than the fact that the *subject* of the alleged fraud is pension benefits is incidental and does not warrant preemption. *See id.* at 742. However, we agree with the Seventh Circuit that *Greenblatt* is not consistent with our Circuit's holding in *Cefalu*. *See Lister v. Stark*, 890 F.2d 941, 945 n. 10 (7th Cir.1989), *cert. denied*, ____ U.S. ____, 111 S.Ct. 579, 112 L.Ed.2d 584 (1990). Therefore, we, like the Seventh Circuit, decline to follow *Greenblatt*. *See id.* at 945.

tion. However, because the employer's complained-of conduct did not pertain to the operation of an ERISA plan, we observed that Hartle's claim did "not in any manner implicate the federal regulation of employee benefit plans" and held that preemption was not proper. *Id.* at 356. Here, the employer's conduct *does* relate to the pension plan, and federal regulation of retirement plans is implicated to a much greater degree.

Finally, appellants argue that even if their state law claims are preempted to the extent that the damages sought are deemed to be "benefits," the preemption would not bar the claims in their entirety, and that the claims for lost wages, exemplary damages, and the like, would survive as state law claims. They rely on several cases finding partial preemption only. One is *Krause v. Dresser Industries, Inc.*, 910 F.2d 674 (10th Cir.1990), in which a terminated employee filed claims under the ADEA and for breach of an implied contract for tenured job security. The district court entered summary judgment for the defendant on the breach-of-contract claim insofar as it sought lost pension, health insurance, or life insurance benefits, on the grounds of ERISA preemption. The Tenth Circuit upheld a verdict for the plaintiff on the claim for lost salary, however, stating, "We are at a loss to see how a breach of contract claim solely for lost salary is at all related to an employee benefit plan," and holding that there was no preemption of that claim. *Id.* at 680 (citing *Hartle*, *supra*). Likewise, in *Sorosky v. Burroughs Corp.*, 826 F.2d 794 (9th Cir.1987), the Ninth Circuit held that an employee's claim of breach of contract and wrongful discharge in part relied on theories independent of the benefit plan and thus was not entirely preempted. *Id.* at 800. Finally, appellants cite *Clark v. Coats & Clark, Inc.*, 865 F.2d 1237, 1245 (11th Cir.1989), for the proposition that the

same set of operative facts can give rise to both preempted and unpreempted causes of action.

We conclude that this type of partial preemption is inappropriate in the present case, however. Unlike *Krause*, this case is not one where the main nexus to an employee benefit plan is only the calculation of damages. Once stripped of its link to the pension plan provided by the measure of damages, the *Krause* plaintiff's claim survived as a suit for lost salary based upon breach of an implied contract of continued employment. Here, by contrast, the basis of the claims themselves is the operation of the pension plan; if appellants' claims were stripped of their link to the pension plans, they would cease to exist. The *Sorosky* and *Clark* courts employed a similar analysis which would support complete preemption in the present case. In *Sorosky*, the court held that Sorosky's claim that Burroughs agreed to provide him with monthly retirement benefits and then sought to prevent him from acquiring those benefits was preempted; it was only breach-of-contract or wrongful discharge theories "that have no relationship to the benefit plan" that survived as independent state law claims. *Sorosky*, 826 F.2d at 800. The *Clark* court confronted an employee's claim that his termination, in addition to being effected for the purpose of interfering with his attainment of pension benefits in violation of ERISA § 510, 29 U.S.C. § 1140, was carried out in a malicious manner that inflicted severe emotional distress upon him. The court held that the tort claim, though it "allude[d] to conduct which was proximate (or even concurrent) in *time* to the alleged ERISA violation," was "wholly remote in *content*"; the employee had "not alleged any conduct on the part of Coats & Clark which relates to the processing of any ERISA covered benefit or claim." *Clark*, 865 F.2d at 1243. However, *Clark* carefully distinguished the employee's claim there from

a claim that a refusal to pay pension benefits was itself so outrageous as to amount to intentional infliction of emotional distress, which the court had found to be preempted in *Howard v. Parisian, Inc.*, 807 F.2d 1560 (11th Cir.1987).

Because the underlying conduct at issue here cannot be divorced from its connection to the employee benefit plan, we uphold the district court's judgment that the state law claims are preempted in their entirety.

III. ERISA Standing

ERISA grants standing to a "participant" to bring a civil action to enforce his rights under the terms of a plan or to enforce the provisions of ERISA. ERISA § 502, 29 U.S.C. § 1132. The district court granted Mobil's motion to dismiss appellants' ERISA claims on the ground that appellants were not "participants" within the meaning of that section and therefore were not empowered to sue. *See Nugent v. Jesuit High School of New Orleans*, 625 F.2d 1285, 1286 & n. 3 (5th Cir.1980).

ERISA defines the term "participant" to include "any employee or former employee . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan." ERISA § 3(7), 29 U.S.C. § 1002(7). The Supreme Court recently addressed the meaning of the "former employee" component of that definition. In *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989), the Court observed that the definition referred to "former employees who 'have . . . a reasonable expectation of returning to covered employment' or who have 'a colorable claim' to vested benefits." *Id.* 109 S.Ct. at 958 (quoting *Kuntz v. Reese*, 785 F.2d 1410, 1411 (9th Cir.) (per curiam), *cert. denied*, 479 U.S. 916, 107 S.Ct. 318, 93 L.Ed.2d 291 (1986)). The Court also construed the

"may become eligible" language of section 3(7) to mean that "a claimant must have a colorable claim that (1) he or she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future." *Id.*

Mobil argues that appellants do not have standing because they have neither a colorable claim for vested benefits nor a reasonable expectation of returning to covered employment. In Mitchell's suit against Mobil, the Tenth Circuit denied ERISA standing to the plaintiffs on the ground here urged by Mobil. *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463, 474 (10th Cir.), *cert. denied*, ____ U.S. ____, 111 S.Ct. 252, 112 L.Ed.2d 210 (1990).

The first part of this conclusion finds support in the decisions of this Circuit. We have held that where, as here, retired employees received in a lump sum benefits that were concededly all to which they were entitled under a plan as it existed at their retirement, their claim is for damages, not vested benefits. *Yancy v. American Petrofina, Inc.*, 768 F.2d 707, 708-09 (5th Cir.1985) (per curiam); *Joseph v. New Orleans Electrical Pension & Retirement Plan*, 754 F.2d 628, 630 (5th Cir.), *cert. denied*, 474 U.S. 1006, 106 S.Ct. 526, 88 L.Ed.2d 458 (1985); *accord Kuntz*, 785 F.2d at 1411. In *Yancy*, the employer announced its intention to modify the interest rate factor used to calculate lump sum retirement benefits, but gave employees approximately three months in which to retire under the older, more generous discount rate. We denied standing to an employee who took early retirement during the three months, received his lump sum payment, then sued alleging that the amendment of the plan violated fiduciary duties imposed by ERISA. We held that, lacking a claim for vested benefits, he could not be deemed a plan "participant." *Yancy*, 768 F.2d at 709.

For the second part of its conclusion—that the plaintiff lacked a reasonable expectation of returning to covered employment—the *Mitchell* court relied on the fact that the plaintiff had not sought reinstatement. *Mitchell*, 896 F.2d at 474; *see also Berger v. Edgewater Steel Co.*, 911 F.2d 911, 922 (3d Cir.1990), *cert. denied*, ____ U.S. ____, 111 S.Ct. 1310, 113 L.Ed.2d 244 (1991); *Kuntz*, 785 F.2d at 1411. In the present case, the only request for reinstatement in appellants' original complaint is in the ADEA claim, which we have held to be barred by the statute of limitations. *See* section I, *supra*. However, this request does indicate that appellants do desire court-ordered reinstatement.

We are not convinced that *Firestone* can be read to reduce the standing question to a straightforward formula applicable in all cases. This seems particularly so in cases involving allegations of discharge. ERISA § 510, 29 U.S.C. § 1140, makes it unlawful for an employer to "discharge, fine, suspend, expel, discipline, or discriminate against a participant" for exercising a right provided by ERISA or "for the purpose of interfering with the attainment" of a right provided by ERISA. The Supreme Court's recent *McClendon* decision held that this provision would foreclose the development of any state law cause of action for wrongful termination to prevent vesting of pension benefits. *Ingersoll-Rand Co. v. McClendon*, ____ U.S. ____, 111 S.Ct. 478, 485, 112 L.Ed.2d 474 (1990). The implication of the Court's holding that the discharged employee must look solely to ERISA for his remedy is that he would have standing to do so. Nevertheless, it is not readily apparent that he would have standing under the construction of *Firestone* urged by Mobil; he would be a former employee lacking both a claim for vested benefits and (unless he requested reinstatement) a reasonable expectation of returning to covered employment. It

would be unusual if in that situation his ability to assert a claim at all turned on whether or not his requested relief included reinstatement; it would seem more logical to say that but for the employer's conduct alleged to be in violation of ERISA, the employee *would* be a current employee with a reasonable expectation of receiving benefits, and the employer should not be able through its own malfeasance to defeat the employee's standing. *Cf. Amalgamated Clothing and Textile Workers v. Murdock*, 861 F.2d 1406, 1418 (9th Cir.1988) ("It would be ironic if the very acts of benefit payment and plan termination that allegedly resulted in a fiduciary personally obtaining ill-gotten profits should also serve to deny plan beneficiaries standing . . . to redress the fiduciaries' alleged breach of the duty of loyalty.").[4]

Therefore, recognizing that we are anchored at one end by *Yancy*, we also believe that *Yancy* does not extend so far as to encompass situations such as the one at issue in *McClendon*. The question then becomes where on that axis the present case falls. A few pertinent distinctions between the two cases bear emphasis. Yancy's position as a retired employee who had received lump sum benefits was largely of his own making. He was informed of the plan amendment and of the effects of each option open to him. Our holding in the case amounts to a decision that he could not both accept the offered inducement for early retirement and then later

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4 We do not mean to imply that an employee's entitlement to certain *remedies* might not turn on whether or not he was willing to return to work. If, for example, he claimed entitlement to the fully vested pension as damages, it might be perfectly reasonable to require that he return to work at least for the additional length of time required for the pension to vest. However, a wrongful discharge might give rise to other damages as well, for which reinstatement would not seem to be a logical prerequisite.

complain of the choice to which he had been put; if he felt that he was entitled to continue to work and then retire at the time of his choice with a lump sum calculated at the old rate, he was obligated to act consistently with his desired relief by remaining a covered employee and challenging the plan amendment. The violation he alleged—an amendment of the retirement plan that amounted to a breach of fiduciary duty under ERISA § 409, 29 U.S.C. § 1109—was not one that in and of itself divested aggrieved parties of their status as covered employees able to sue. McClendon, on the other hand, had no such choice. A discharge to prevent vesting of benefits in violation of section 510 by definition must be challenged by someone other than a current employee or someone with a claim to vested benefits. Thus, the standing question and the merits of an employee's claim are unavoidably intertwined to some degree; whether a plaintiff has standing to assert ERISA rights may depend upon whether he can establish a discharge or some other conduct in violation of ERISA, but for which he would have standing. *See Amalgamated Clothing*, 861 F.2d at 1410.

The Third Circuit alluded to this problem in its recent *Berger* decision. There, Edgewater Steel amended its retirement plan to eliminate two benefits: a lump sum payment in place of the first three months of pension benefits, and a supplemental payment given as an early retirement benefit to employees whose retirement was in the mutual interests of the company and the retiree and was approved by the company. Upon announcement of these changes, Berger and the other plaintiffs chose to retire before the amendments became effective. They each received the three-month lump sum provided automatically to all retirees, but none were approved for the supplemental payment. Among the plaintiffs' allegations were a charge that the elimination of the three-month

lump sum amounted to the elimination of an accrued benefit in violation of ERISA § 204(g), 29 U.S.C. § 1054(g), and a charge that the amendment constituted an intentional interference with their right to both benefits, in violation of ERISA § 510, 29 U.S.C. § 1140. The court, citing *Kuntz* and *Yancy*, held that the plaintiffs did not have standing to assert their section 204(g) claim because they had retired and accepted the benefits in a lump sum, and had not asked for reinstatement. *Berger*, 911 F.2d at 921-22. However, the court noted the contingency of this conclusion on the denial of the plaintiffs' section 510 claim. *Id.* at 922. It stated: "Of course, we recognize that if the Employees were constructively discharged as they do claim, they would not necessarily have to return to work in order to have standing to claim a make whole remedy." *Id.*[5]

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5 A Third Circuit decision in a pre-*Firestone* case provides an even more direct illustration of the contingency of standing on the nature of the ERISA violation alleged. In *Saporito v. Combustion Engineering Inc.*, 843 F.2d 666 (3d Cir.1988); *vacated*, 489 U.S. 1049, 109 S.Ct. 1306, 103 L.Ed.2d 576 (1989), the plaintiffs claimed that they had been induced to retire under one retirement plan while the employer concealed the development of a second plan with more favorable terms. The court held that they did not have standing as participants in the first plan to sue for breach of fiduciary duties because they had retired and received all of the benefits to which they were entitled in a lump sum. *Id.* at 671. However, the court did hold that they had standing as participants in the *second* plan to argue that they had been tricked into retiring in violation of section 510, because they alleged that "but for the selective divulgence of information, they would have been members of [the second plan], and, for the purposes of standing to bring an action under ERISA, should be considered as such." *Id.* at 672; *see also id.* at 672 n. 7 (distinguishing *Stanton v. Gulf Oil Corp.*, 792 F.2d 432 (4th Cir.1986), in which the plaintiff urged "but for" participant standing, but his claim was rejected because the events precluding standing were under his control). *Saporito* was vacated and remanded by the Supreme Court for further consideration in light of *Firestone*, 489 U.S. 1049, 109 S.Ct. 1306, 103 L.Ed.2d 576 (1989).

On the record before us, we cannot say where on the spectrum between *Yancy* and *McClendon* this case falls. Because appellants pleaded their ERISA claims only as contingent on preemption of their state law claims, and because the district court did not rule on the merits of the ERISA claims, appellants have not fleshed out their ERISA claims and theories, or even identified with precision which sections of ERISA they claim were violated. However, their allegations do at least suggest an assertion that they were constructively discharged in violation of section 510 and that but for Mobil's nondisclosure they would be covered employees with standing to challenge the plan amendment. They allege deceptive conduct by Mobil that might be found to vitiate the voluntariness of their decision to retire and that might distinguish the present case from both *Yancy* and *Mitchell*. Appellants also sought reinstatement in their ADEA action, and did not affirmatively indicate that reinstatement was not sought under their ERISA claims. For these reasons, we cannot now foreclose the possibility that they could prove facts that would create standing for them, and we believe that the trial court's dismissal on the pleadings of the ERISA claims was premature. Of course, appellants can, and doubtless should, be required to plead their ERISA claims with greater specificity.

We emphasize that we have not determined that appellants will be able to establish a violation of section 510, only that they should be allowed to attempt to do so. We reverse the trial court's dismissal of appellants' ERISA claims and remand for further proceedings consistent with this opinion.

Conclusion

For the reasons stated above, we affirm the district court's grant of summary judgment to Mobil on the ADEA claims and its grant of judgment on the pleadings for Mobil on all of appellants' state law claims. However, we reverse and remand the district court's dismissal of appellants' ERISA claims.

AFFIRMED In Part; REVERSED And REMANDED In Part.

Order of the United States District Court for the Eastern District of Texas granting Motion for Judgment on the Pleadings and Motion to Dismiss, June 22, 1990

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

Civ. No. B-89-0653-CA

June 22, 1990

GERALD W. CHRISTOPHER, *et al.*,
Plaintiffs,

—v.—

MOBIL OIL CORPORATION, *et al.*,
Defendants.

ORDER

1. CAME ON to be considered the Motion for Judgment on the Pleadings and Motion to Dismiss filed by defendants Mobil Oil Corporation, the Retirement Plan of Mobil Oil Corporation and Rex Adams (collectively, "Mobil"); and the Court, having considered such Motion, the supporting memorandum, and plaintiffs' opposition thereto, finds:

A. Plaintiffs' state-law claims are preempted by the Employee Retirement Income Security Act of 1974 ("ERISA") because those claims relate to Mobil's Retirement Plan, which is governed by

ERISA, and directly overlap with provisions of ERISA;

B. Plaintiffs are not participants seeking to recover benefits under Mobil's Retirement Plan and therefore have no cause of action under ERISA § 502; and

C. The Court lacks jurisdiction over plaintiffs' ERISA claim because plaintiffs do not have a cause of action under ERISA.

2. Based on these findings, the Court is of the opinion that said motion should be in all things GRANTED.

3. It is therefore ORDERED, ADJUDGED and DECREED by the Court that defendants' Motion for Judgment on the Pleadings and Motion to Dismiss be, and the same hereby is, GRANTED and the case dismissed in its entirety with prejudice, at plaintiffs' cost.

SIGNED THIS 22nd DAY OF JUNE, 1989 [sic].

/s/ RICHARD A. SCHELL
United States District Judge

Order of the United States District Court for the Eastern District of Texas granting Motion for Summary Judgment, June 22, 1990

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

Civ. No. B-89-0653-CA

June 22, 1990

GERALD W. CHRISTOPHER, *et al.*,
Plaintiffs,

—v.—

MOBIL OIL CORPORATION, *et al.*,
Defendants.

ORDER

1. CAME ON to be considered the Motion for Summary Judgment filed by defendants Mobil Oil Corporation, the Retirement Plan of Mobil Oil Corporation and Rex Adams (collectively, "Mobil"); and the Court, having considered such Motion, the supporting memorandum, statement of undisputed facts, declaration and affidavit, and plaintiffs' opposition thereto, finds:

A. Plaintiffs' Age Discrimination in Employment Act ("ADEA") claims are time-barred because (*i*) plaintiffs did not file an age-discrimination charge with the Equal Employment Opportunity Commission within 300 days after the alleged discrimination occurred (29 U.S.C. § 626(d)(2)), and (*ii*) plaintiffs

did not file a lawsuit under ADEA within three years after the alleged discrimination occurred (29 U.S.C. §§ 255(a), 626(e));

B. Plaintiffs' state-law claims are time-barred by applicable statutes of limitations;

C. Plaintiffs were not constructively discharged in violation of ADEA; and

D. Plaintiffs' claims of discrimination arise from changes in the fringe benefits available under Mobil's bona fide Retirement Plan, not from any conduct related to the nonfringe-benefit aspects of plaintiffs' employment, and are therefore not within the scope of ADEA pursuant to 29 U.S.C. § 623(f)(2).

2. Based on these findings, the Court is of the opinion that said motion should be in all things GRANTED.

3. It is therefore ORDERED, ADJUDGED and DECREED by the Court that defendants' Motion for Summary Judgment be, and the same hereby is, GRANTED and the case dismissed in its entirety with prejudice, at plaintiffs' cost.

SIGNED THIS 22nd DAY OF JUNE, 1989 [sic].

/s/ RICHARD A. SCHELL
United States District Judge

Order of the United States Court of Appeals for the Fifth Circuit denying appellants' petition for rehearing, February 24, 1992

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-4562

Filed: Feb. 24, 1992

GERALD W. CHRISTOPHER, CHARLES L. PRUNTY and BILLY G. TURNER,

Plaintiffs-Appellants,

versus

MOBIL OIL CORPORATION, RETIREMENT PLAN OF MOBIL OIL CORPORATION AND REX ADAMS,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Texas

ON PETITION FOR REHEARING

( )

Before:

HENLEY*, KING, and GARWOOD,
Circuit Judges.

* Circuit Judge of the Eighth Circuit, sitting by designation.

PER CURIAM:

IT IS ORDERED that appellants' petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ WILL GARWOOD
United States Circuit Judge

Order of the United States Court of Appeals for the Fifth Circuit denying appellees' petition for rehearing, February 24, 1992

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-4562

Filed: Feb. 24, 1992

GERALD W. CHRISTOPHER, CHARLES L. PRUNTY and BILLY G. TURNER,

Plaintiffs-Appellants,

versus

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Appeal from the United States District Court for the Eastern District of Texas

ON PETITION FOR REHEARING

( )

Before:

HENLEY*, KING, and GARWOOD,

Circuit Judges.

* Circuit Judge of the Eighth Circuit, sitting by designation.

PER CURIAM:

IT IS ORDERED that appellants' petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ WILL GARWOOD
United States Circuit Judge

ERISA § 3(7), 29 U.S.C. § 1002(7)

For purposes of this subchapter:

* * *

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

ERISA § 502, 29 U.S.C. § 1132

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary *(A)* to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or *(B)* to obtain other appropriate equitable relief *(i)* to redress such violations or *(ii)* to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of [section] 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary *(A)* to enjoin any act or practice which violates any provision of this subchapter, or *(B)* to obtain other appropriate equitable relief *(i)* to redress such violation or *(ii)* to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (c)(2) or *(i)* or *(l)* of this section.

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions

(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of Title 26 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) of this section with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if—

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 1145 of this title.

(c) Administrator's refusal to supply requested information; penalty for failure to provide annual report in complete form

(1) Any administrator *(A)* who fails to meet the requirements of paragraph (1) or (4) of section 1166 of this title or section 1021(e)(1) of this title with respect to a participant or beneficiary, or *(B)* who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to fur-

nish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

(2) The Secretary may assess a civil penalty against any plan administrator of up to $1,000 a day from the date of such plan administrator's failure or refusal to file the annual report required to be filed with the Secretary under section 1021(b)(4) of this title. For purposes of this paragraph, an annual report that has been rejected under section 1024(a)(4) of this title for failure to provide material information shall not be treated as having been filed with the Secretary.

(3) Any employer maintaining a plan who fails to meet the notice requirement of section 1021(d) of this title with respect to any participant or beneficiary or who fails to meet the requirements of section 1021(e)(2) of this title with respect to any person may in the court's discretion be liable to such participant or beneficiary or to such person in the amount of up to $100 a day from the date of such failure, and the court may in its discretion order such other relief as it deems proper.

(d) Status of employee benefit plan as entity

(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpoena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the

employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties

The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan—

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of—

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

(h) Service upon Secretary of Labor and Secretary of Treasury

A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) of this section which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) of this section on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty

In the case of a transaction prohibited by section 1106 of this title by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved in each such transaction (as defined in section 4975(f)(4) of Title 26) for each year or part thereof during which the prohibited transaction continues, except that, if the transaction is not corrected (in such manner as the Secretary shall prescribe in regulations which shall be consistent with section 4975(f)(5) of Title 26) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may

be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of Title 26.

(j) Direction and control of litigation by Attorney General

In all civil actions under this subchapter, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of Title 28), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Jurisdiction of actions against the Secretary of Labor

Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this chapter, or to compel him to take action required under this subchapter, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

***(l)* Civil penalties on violations by fiduciaries**

(1) In the case of—

(A) any breach of fiduciary responsibility under (or other violation of) part 4 by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person,

the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1)—

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5) of this section.

(3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that—

(A) the fiduciary or other person acted reasonably and in good faith, or

(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of Title 26.

ERISA § 510, 29 U.S.C. § 1140

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C. § 301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

Listing of Mobil Oil Corporation Subsidiaries

Listing Pursuant to Sup. Ct. R. 29.1 of Mobil Oil Corporation's Parent and Non-Wholly-Owned Subsidiaries of Which Mobil Oil Corporation Owns at Least 5% (as of February 18, 1992)

MOBIL CORPORATION (PARENT)

ABRORAY PTY. LIMITED
ABU DHABI PETROLEUM COMPANY LIMITED
ACE POLYMER CO., LTD.
ADRIA WIEN PIPELINE GESMBH
AIMCO (ALPHA) SHIPPING COMPANY
AIMCO (OMEGA) SHIPPING COMPANY LTD.
AIRCRAFT FUEL SUPPLY B.V.
AIRTANKDIENST KOELN
AK CHEMIE GMBH & CO. KG
AKAUMA ASPHALT INDUSTRIES, LTD.
ALEXANDROUPOLIS PETROLEUM INSTALLATION S.A.
ALTONA PETROCHEMICAL COMPANY LIMITED
AMMENN GMBH
ANDREWS OIL PTY. LIMITED
ANKARA GAZ SATIS A.S.
ARABIAN CHEMICAL TERMINALS
ARABIAN INTERNATIONAL MARITIME COMPANY
ARABIAN INTERNATIONAL MARITIME COMPANY LIMITED
ARABIAN TRADING CO. S.A.
ARAL AKTIENGESELLSCHAFT
ATAS ANADOLU TASFIYEHANESI A.S.
ATLAS SAHARA S.A.
AUSTRALIAN SYNTHETIC RUBBER CO LIMITED

AUTOBAHN-BETRIEBE GESELLSCHAFT MBH
AVIATION FUEL SERVICES LIMITED
AYGAZ A.S.
BALGEE OIL PTY. LIMITED
BANGKOK AVIATION FUEL SERVICES LIMITED
BARRORAFT PTY. LTD
BAYERISCHE ERDGASLEITUNG GMBH
BAYERISCHE MINERAL-INDUSTRIE A.G.
BEER GMBH
BEER GMBH & CO. MINERALOEL-VERTRIEBS-KG
BIN SULAIMAN MOBIL TOWERS
BRICKWOOD HOLDINGS PTY. LTD
BUCK MINERALOELHANDEL KG
CANADIAN SUPERIOR OIL (AUST.) PTY. LTD.
CANNER'S STEAM COMPANY, INC.
CANYON REEF CARRIERS, INC.
CAS (COMBINED AUTOMATION SYSTEM) B.V.
CELMISIA SHIPPING CORPORATION
CENTRAL AFRICAN PETROLEUM REFINERIES (PRIVATE) LIMITED
CERCERA S.A.
CHANGI AIRPORT FUEL HYDRANT INSTALLATION PTE. LTD.
CHUBU TORESEN K.K.
COLLINS PIPELINE COMPANY
COLOMBIANOS DISTRIBUIDORES DE COMBUSTIBLES, S.A. "CODI"
COLONIAL PIPELINE COMPANY
COMET BRENNSTOFFDIENST GMBH
COMMERCIAL POLYMERS PTY. LIMITED
COMMODORE MARITIME COMPANY S.A.
COMPAGNIE AFRICAINE DE TRANSPORT CAMEROUN (CAT.CN)
COMPAGNIE D'ENTREPOSAGE COMMUNAUTAIRE
COMPAGNIE DES PETROLES PRIMAGAZ

COMPAGNIE SENEGALAISE DES LUBRIFIANTS
COMPANIA DE LUBRICANTES DE CHILE
LIMITADA (COPEC MOBIL LTDA.)
CONSORTIUM RAYMOND DUEZ
COOK INLET PIPE LINE COMPANY
COREDIS
CORYTON COGEN LIMITED
CYPRUS PETROLEUM REFINERY LIMITED
DEPOT PETROLIER DE MOUREPIANE
DEPOT PETROLIER DU GRESIVAUDAN
DEPOTS DE PETROLE COTIERS
DEPOTS PETROLIERS DE LA CORSE (DPLC)
DEUTSCHE PENTOSIN-WERKE GMBH
DEUTSCHE TRANSALPINE OELLEITUNG GMBH
DIXIE PIPELINE COMPANY
DUKHAN SERVICES COMPANY W.L.L.
DUPONT & DEWULF N.V.
EAST TEXAS SALT WATER DISPOSAL COMPANY
ENTREPOT PETROLIER DE MULHOUSE
ENTREPOT PETROLIER DE NANCY
ENTREPRISE JEAN LEFEBVRE
ERDGAS-VERKAUFS-GESELLSCHAFT MBH
ERDOEL-RAFFINERIE NEUSTADT GMBH
& CO. OHG
ERDOL-LAGERGESELLSCHAFT MBH
ESTACIONES DE SERVICIO ML, S.A.
ETABLISSEMENTS BOUTHENET
ETABLISSEMENTS JOSEPH WALLACH
ETABLISSEMENTS ROHRMANN DUFOSSE
FAIRWIND MARITIME COMPANY S.A.
FAVANG AUTOVERKSTED A/S
FELIX OIL COMPANY
FIBIL S.A.
FILTROS DE COSTA RICA, S.A.
FRUEHMESSER GMBH

FRUEHMESSER MINERALOLHANDELS GMBH & CO. KG
FUSO OPERATIONS KABUSHIKI KAISHA
GATWICK REFUELLING SERVICES LIMITED
GAZAL-GAZ ALETLERI A.S.
GEOMINES-CAEN
GEOVEXIN
GHANA BUNKERING SERVICES LIMITED
HANIEL HANDEL GMBH
HEIZOL-HANDELSGESELLSCHAFT MBH
HELLAS GAS STORAGE CO. S.A.
HIBERNIA MANAGEMENT AND DEVELOPMENT COMPANY LIMITED
HYDRANTEN-BETRIEBS-GESELLSCHAFT FLUGHAFEN/FRANKFURT
INDUSTRIA INTERAMERICANA DE FILTROS LTDA. "INTERFIL"
INTOPLANE SERVICES COMPANY LIMITED
IRANIAN OIL PARTICIPANTS LTD.
IRANIAN OIL SERVICES (HOLDINGS) LTD.
IRANIAN OIL SERVICES LIMITED
IRAQ PETROLEUM COMPANY LIMITED
IRAQ PETROLEUM PENSIONS LIMITED
ITALOIL S.R.L.
JAPAN AIRPORT FUELING SERVICE COMPANY, LTD.
JECOP
K.K. SANKYO PLASTICS
K.K. TORESEN
KANSAI PETRO-TERMINAL CO., LTD.
KANTO KYGNUS SEKIYU HAMBAI K.K.
KARL STORZ GMBH & CO. KG
KAWASAKI KYGNUS SEKIYU HAMBAI K.K.
KEIYO SEA-BERTH COMPANY, LTD.
KLAUS KOEHN GMBH
KLAUS KOEHN GMBH & CO. MINERALOEL KG

KURT AMMENN GMBH & CO. KG
KYGNUS EKKA GAS KABUSHIKI KAISHA
KYGNUS KOSAN KABUSHIKI KAISHA
KYGNUS MARKETING SERVICE K.K.
KYGNUS SEKIYU KABUSHIKI KAISHA
KYGNUS SEKIYU SEISEI KABUSHIKI KAISHA
KYOKUTO SEKIYU KOGYO KABUSHIKI KAISHA
LA CENTRAFRICAINE DES PETROLES
LILAC SEKIYU K.K.
LIPET-LIKIT PETROL GAZI VE YAKIT TICARET A.S.
LUBLEND LIMITED
LUBRICANTES DEL SUR, S.A.
MARCEAUX & CIE
MATCO TANKERS (U.K.) LIMITED
MEENTZEN & FRANKE GMBH & CO.
MERTL GMBH
MID STATE PETROLEUM PTY. LIMITED
MINERALOEL-HANDELS-GESELLSCHAFT MBH
MINERALOELWERK WEDEL GMBH & CO. OHG
MOBIL CATALYSTS CORPORATION OF JAPAN
MOBIL KOREA LUBE OIL, INC.
MOBIL MARKETING BARBADOS COMPANY LIMITED
MOBIL MOTOR REST S.A.
MOBIL OIL—AFOR KERESKEDELMI KFT.
MOBIL OIL BARBADOS LIMITED
MOBIL OIL DE MEXICO, S.A. DE C.V.
MOBIL OIL DJIBOUTI
MOBIL OIL FRANCAISE
MOBIL OIL GABON
MOBIL OIL GHANA LIMITED
MOBIL OIL MAROC
MOBIL OIL NIGERIA PUBLIC LIMITED COMPANY
MOBIL OIL PORTUGUESA S.A.

MOBIL PRODUCING CAMEROON INC.
MOBILGAZ MOBIL PETROL GAZLARI A.S.
MOGESTE-GESTAO DE POSTOS DE ABASTECIMENTO LDA.
MOTEL REST S.A.
MT. MARROW BLUE METAL QUARRIES PTY. LIMITED
MULTI TANK CARD B.V.
N.V. ROTTERDAM-RIJN PIJPLEIDING MAATSCHAPPIJ
N.V. SOCONY-STANDARD-VACUUM OIL COMPANY (PETROLEUM MAATSCHAPPIJ)
NAKAJIMA KOSAN KABUSHIKI KAISHA
NEAR EAST DEVELOPMENT CORPORATION
NEW ZEALAND SYNTHETIC FUELS (HOUSING) CORPORATION LIMITED
NEW ZEALAND SYNTHETIC FUELS CORPORATION LIMITED
NICHIMO OIL (BERMUDA) CO., LTD.
NIPPON UNICAR COMPANY, LIMITED
NORDDEUTSCHE ERDGAS-AUFBEREITUNGS-GESELLSCHAFT MBH
NORVAC PTY. LIMITED
OCTAGON PTY. LTD
OLDENBURGISCHE ERDOEL GESELLSCHAFT MBH
OLJEFORSYNING OFAS A.S.
OSAKA KYGNUS K.K.
OVENS & MURRAY PETROLEUM PTY. LTD.
P.T. ARUN NATURAL GAS LIQUEFACTION COMPANY
P.T. STANVAC INDONESIA
PALOMA PIPE LINE COMPANY
PARS INVESTMENT CORPORATION (PRIVATE COMPANY)

PAUL HARLING MINERALOEL GMBH & CO. KG
PEACE PIPE LINE LTD.
PERKAL PTY. LIMITED
PETROCAB
PETROCAM PTY. LIMITED
PETROGAS PROCESSING LTD.
PETROLEUM SERVICES (MIDDLE EAST) LIMITED
PETROMIN LUBRICATING OIL COMPANY
PETROMIN LUBRICATING OIL REFINING COMPANY
PETROMIN-MOBIL YANBU REFINERY COMPANY LTD.
PIONEER KOSAN K.K.
PLEGADIZOS PARA LA INDUSTRIA S.A.
PRESNALL PTY. LIMITED
PROGAS LIMITED
PROVIDANGE
P6-GROEP B.V.
R. SHERWOOD LIMITED
RACOON S.R.L.
RAINBOW PIPE LINE COMPANY LTD.
RED SEA PLASTIC FACTORY COMPANY LIMITED
REGULUS HOLDING (SINGAPORE) PTE. LTD.
RHODES PETROLEUM INSTALLATION S.A.
ROHOL-AUFSUCHUNGS GESELLSCHAFT MBH
RUHRGAS AKTIENGESELLSCHAFT
RUNDEL MINERALOELVERTRIEB GMBH
S.C. BRUSSELS AIRFUELS SERVICES C.V.
SABA-SOCIEDADE ABASTECEDORA DE AERONAVES LDA.
SARL ETABLISSEMENTS MICHEL FAURE
SAUDI MARITIME COMPANY LTD.
SAUDI YANBU PETROCHEMICAL CO.
SAWYER PETROLEUM PTY. LTD.
SCHUBERT KOMMANDITGESELLSCHAFT

SEGHER DE MEXICO, S.A. DE C.V.
SIERRA LEONE PETROLEUM REFINING COMPANY LIMITED
SIGEL INCORPORATED
SOCIETÀ ITALIANA PER L'OLEODOTTO TRANSALPINO—SIOT S.P.A.
SOCIETE "LES FILS DE FERRERO"
SOCIETE AFRICAINE DE RAFFINAGE (S.A.R.)
SOCIETE ANONYME DE GESTION DES STOCKS DE SECURITE
SOCIETE BELGE DE TRANSPORT PAR PIPELINE S.A.
SOCIETE CAMEROUNAISE DE DEPOTS PETROLIERS (S.C.D.P.)
SOCIETE COLMARIENNE DE DISTRIBUTION DE PRODUITS PETROLIERS
SOCIETE COMBUSTIBLES DE PROVENCE
SOCIETE D'ENTREPOSAGE DE GABES
SOCIETE D'ENTREPOSAGE DE SAN PEDRO
SOCIETE D'ENTREPOSAGE PETROLIER AU BURUNDI (SEP BURUNDI)
SOCIETE DE CONSTRUCTION & DE GESTION CB.12
SOCIETE DE GESTION DE DEPOTS D'HYDROCARBURES
SOCIETE DE GESTION DES STOCKS PETROLIERS DE COTE D'IVOIRE (GESTOCI)
SOCIETE DE MANUTENTION CARBURANTS AVIATION DE TAHITI (SOMCAT)
SOCIETE DE MANUTENTION DE CARBURANTS AVIATION (S.M.C.A.)
SOCIETE DE MANUTENTION DE CARBURANTS AVIATION DAKAR-OFF
SOCIETE GABONAISE D'ENTREPOSAGE DE PRODUITS PETROLIERS
SOCIETE GABONAISE DE RAFFINAGE

SOCIETE IVOIRIENNE DE FABRICATION DE LUBRIFIANTS (S.I.F.A.L.)
SOCIETE IVOIRIENNE DE RAFFINAGE
SOCIETE MALIENNE D'ENTREPOSAGE (S.M.E.)
SOCIETE MAURITANIENNE D'ENTREPOSAGE DE PRODUITS PETROLIERS
SOCIETE NATIONALE DE RAFFINAGE
SOCIETE PIZO DE FORMULATION DE LUBRIFIANTS
SOCIETE STATION-SERVICE LUNES
SOCIETE TAHITIENNE DE DEPOTS PETROLIERS
SOCIETE TAHITIENNE DES OLEODUCS (STDO)
SOCIETE TCHADIENNE D'ENTREPOSAGE DE PRODUITS PETROLIERS
SOCIETE TOGOLAISE D'ENTREPOSAGE
SOCIETE WALLISIENNE ET FUTUNIENNE D'ENTREPOSAGE DE PRODUITS PETROLIERS
SOCIETE ZAIROISE D'EMBALLAGE
SOUTH SASKATCHEWAN PIPE LINE COMPANY
STATFJORD TRANSPORT A.S.
STE CAMEROUNAISE EQUATORIALE DE FABRICATION DE LUBRIFIANTS (S.C.E.F.L.)
STE DES BITUMES & CUT-BACKS DU CAMEROUN (S.B.C.B.C.)
STRASBURGER ENTERPRISES (PROPERTIES) PTY. LIMITED
SUN EAST COMPANY LIMITED
SUPERIOR DISK CORPORATION
SYDNEY METROPOLITAN PIPELINE PTY. LIMITED
T&M TERMINAL COMPANY
TANKBAU-GMBH
TANKLAGERGESELLSCHAFT KOELN-BONN
TAR TANKANLAGE RUEMLANG A.G.
TECKLENBURG GMBH

TECKLENBURG GMBH & CO. ENERGIEBEDARF KG
TEMA LUBE OIL COMPANY LIMITED
TGF TANKDIENST-GESELLSCHAFT FRANKFURT
THAILAND SOLVENT PRODUCTS LIMITED
THE ARABIAN ENERGY COMPANY LIMITED
THE ARABIAN PETROLEUM SUPPLY CO. (S.A.)
THE NEW ZEALAND REFINING COMPANY LIMITED
THE SAUDI CAN COMPANY LTD.
TOHPREN CO. LTD.
TOKUSHIMA SEKIYU KABUSHIKI KAISHA
TONEN CHEMICAL CORPORATION
TONEN CORPORATION
TONEN ENERGY AND MARINE (SINGAPORE) PTE. LTD.
TONEN ENERGY INTERNATIONAL CORPORATION
TONEN FILARE CO., LTD.
TONEN FILM CO., LTD.
TONEN PROPERTIES INC.
TONEN SOGO SERVICE CO. LTD.
TONEN SYSTEM PLAZA INC.
TONEN SYSTEM SERVICE INC.
TONEN TANKER KABUSHIKI KAISHA
TONEN TAPYRUS COMPANY LIMITED
TONEN TECHNOLOGY KABUSHIKI KAISHA
TONEX COMPANY LIMITED
TOWA COMPOUNDING COMPANY LIMITED
TOYOSHINA FILM COMPANY LIMITED
TRADEWIND MARITIME CO. S.A.
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Supreme Court, U.S.
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No. 91-1881

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MOBIL OIL CORPORATION, THE RETIREMENT PLAN OF MOBIL OIL CORPORATION, and REX ADAMS,

Petitioners,

vs.

GERALD W. CHRISTOPHER, CHARLES L. PRUNTY, and BILLY G. TURNER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE ERISA INDUSTRY COMMITTEE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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No. 91-1881

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BRIEF *AMICUS CURIAE* OF THE ERISA INDUSTRY COMMITTEE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

With the consent of the parties, The ERISA Industry Committee ("ERIC") respectfully submits this brief *amicus curiae* in support of the petition for writ of certiorari of Mobil Oil Corporation, the Retirement Plan of Mobil Oil Corporation, and Rex Adams.

THE INTEREST OF THE *AMICUS CURIAE*

ERIC is a nonprofit association of more than one hundred companies doing business in a wide variety of United States industries. A list of ERIC's members is set forth in the Appendix to this brief.

ERIC's membership comprises a broad cross-section of major firms that maintain employee pension and welfare plans covered under

the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* All of ERIC's members do business in more than one state, and some members maintain pension and welfare plans that provide benefits to employees in all fifty states. Like the plan in this case, many of the pension plans sponsored by ERIC's members provide that employees who retire or otherwise terminate employment may select an immediate lump-sum distribution in lieu of such alternatives as a lifetime monthly pension or deferred distributions.

ERIC and its members accordingly have a substantial interest in seeking a sound and uniform interpretation of ERISA in cases, such as this one, that include issues of great importance in the application of ERISA to pension plans.

REASONS FOR GRANTING THE WRIT

Because of the breadth of ERISA's regulation of pension and other employee benefit plans, ERISA's statutory definition of who is a "participant" with standing to sue in federal court to remedy alleged violations is of fundamental importance. The decision of the Fifth Circuit on this issue in this case is in conflict with the Tenth Circuit's decision in *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463 (10th Cir.), *cert. denied*, 111 S. Ct. 252 (1990), and appears to conflict with both the Court's ruling in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), and decisions in other Circuits following *Firestone*. In *Mitchell*, which involved the same nucleus of operative facts as this case, a former employee who had received all his accrued plan benefits was held not to be a "participant" with standing. By contrast, the Fifth Circuit in this case has held that employees who have similarly received all their accrued benefits may establish standing under certain circumstances.[1]

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[1] In addition to *Mitchell*, the Fifth Circuit's decision is in direct conflict with decisions of the Fourth Circuit, *Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 435 (4th Cir. 1986) (rejecting "but for" test for standing), and the Ninth Circuit, *Freeman v. Jacques Orthopaedic & Joint Implant Surgery Medical Group, Inc.*, 721 F.2d 654, 655-56 (9th Cir. 1983) (same), and conflicts with the reasoning of the Seventh Circuit in *Winchester v. Pension Committee of Michael Reese*, 942 F.2d 1190, 1192-93 (7th Cir. 1991) (plaintiff not a "participant" by virtue of separate discrimination suit seeking reinstatement).

A resolution of this conflict is critical to establish whether former employees who have received all their accrued pension benefits as of the cessation of their employment nevertheless retain the status of "participants" with standing to bring ERISA actions. Census Bureau figures show that approximately 22 million employees participate in plans allowing lump sum distributions of accrued pension benefits upon retirement or other termination of employment.[2] Unless the conflict of decisions is resolved, neither employees considering whether to elect an immediate lump sum, nor employers whose plans make such distributions, can know whether the distribution will end the employee's status as a plan "participant" to whom the employer and plan have continuing obligations under ERISA.

1. A split among the Circuits on a question so crucial as the meaning of "participant" severely impairs the efficacy of ERISA for ERIC's members and other multi-state employers, and places them in an untenable position.

An employer must weigh the value of a benefit plan to the employees against the costs of establishing and maintaining it, including potential legal liability. Before ERISA, many plans were subject to different — and often conflicting — state statutes and regulations. The inherent difficulties and uncertainties acted as disincentives for employers to provide the best forms of employee benefits. *See Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9-11 (1987).

ERISA resolved this problem by establishing uniform nationwide standards. In addition, Congress included a broad preemption provision that has been interpreted consistently in accordance with this purpose.

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[2] Joseph S. Piacentina, Employee Benefit Research Institute Issue Brief No. 98, *Preservation of Pension Benefits*, at 3 (Jan. 1990) (citing United States Census Bureau May 1988 Current Population Survey). These employees are typically offered a lump sum distribution as an option along with such alternatives as deferred distribution or an annuity, because, except for certain small benefits, plans are generally prohibited by law from requiring employees to receive an immediate lump sum distribution. *See* ERISA §§ 203(e), 205(a) & (g), 29 U.S.C. §§ 1053(e), 1055(a) & (g).

> It is . . . clear that ERISA's pre-emption provision was prompted by recognition that employers establishing and maintaining employee benefit plans are faced with the task of coordinating complex administrative activities. A patchwork scheme of regulation would introduce considerable inefficiencies in benefit plan operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them.

Fort Halifax, 482 U.S. at 11. This Court "ha[s] not hesitated to enforce ERISA's pre-emption provision where state law created the prospect that an employer's administrative scheme would be subject to conflicting requirements." *Id.* at 10. The conflict resulting from the Fifth Circuit's decision similarly thwarts Congressional intent by restoring inconsistency and by adding vast, unquantifiable potential grounds for liability for damages and litigation costs.

Roughly a million or more employees terminate employment each year and receive all the plan benefits to which they are entitled.[3] Some of them may have grievances they wish to pursue through a claim for wrongful discharge. Under the Fifth Circuit's holding in this case, these employees may now have standing to bring their claims in federal courts in the Fifth Circuit, while they do not have standing to do so in other Circuits. It is essential for employers and employees alike that the law on such a fundamental issue be consistent in all the Circuits.

2. The issue here — whether former employees who have received all the accrued plan benefits to which they are entitled have standing under ERISA — has important implications for the volume of litigation in the federal courts. Under the Fifth Circuit's standard, almost any employee who has participated in an ERISA plan and received all his or her accrued plan

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[3] *See* Joseph S. Piacentina, *supra*, at 15, 19 (Jan. 1990) (3.4 million employees received lump sum distributions between 1985 and May 1988).

benefits can now convert a garden-variety state-law cause of action for wrongful discharge into an ERISA case by including a claim for violation of ERISA § 510, 29 U.S.C. § 1140. This claim can then be filed in federal district court, creating new possibilities for forum-shopping. The numerous multi-state plans, including those of ERIC's members, are particularly vulnerable in this regard. *See Patterson v. Shumate*, 60 U.S.L.W. 4550, 4553 (U.S. June 15, 1992) (an "important policy underlying ERISA [is] uniform national treatment of pension benefits.").[4]

3. The Fifth Circuit's decision is wrong on the merits. *Firestone* resolved the question whether former employees who claimed they were improperly denied severance benefits were nonetheless "participants" entitled to receive plan information pursuant to ERISA § 104(b)(4), 29 U.S.C. § 1024(b)(4), one of ERISA's disclosure provisions. The Court found that the Third Circuit had strayed too far from the language of ERISA § 3(7), 29 U.S.C § 1002(7), in holding that anyone who "*claims to be* a participant or beneficiary" is entitled to such disclosure, *Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134, 152 (3d Cir. 1987). Instead, the Court held that

> the term "participant" is naturally read to mean either "employees in, or reasonably expected to be in, currently covered employment," *Saladino v. I.L.G.W.U. National Retirement Fund*, 754 F.2d 473, 476 (2d Cir. 1985), or former employees who "have . . . a

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[4] Under the Fifth Circuit's holding former employees who have received all their accrued benefits can now challenge the employer's conduct in funding the plan or investing plan assets by alleging a wrongful discharge or other discriminatory action in violation of § 510 of ERISA, even though these former employees are not affected by funding or investment decisions. *See* ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) (authorizing "participants" to "enforce any provisions of" ERISA Title I, including funding and fiduciary requirements). While it may be appropriate for former employees who have not yet received all their vested benefits to have standing to enforce ERISA's funding and fiduciary requirements, those who have already received all their benefits have no legitimate interest in maintaining such actions.

> reasonable expectation of returning to covered employment" or who have "a colorable claim" to vested benefits, *Kuntz v. Reese*, 785 F.2d 1410, 1411 (9th Cir.) (*per curiam*), *cert. denied*, 479 U.S. 916 (1986).

Firestone, 489 U.S. at 117.

ERISA allows civil suits only "by a participant or beneficiary." ERISA § 502(a)(1), 29 U.S.C. § 1132(a)(1). To find possible standing for the plaintiffs in this case, the Fifth Circuit therefore found it necessary to hold that the term "participant," which has only a single statutory definition, actually has different meanings for different parts of ERISA, and that *Firestone* defined "participant" for only one purpose. *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209, 1221 (5th Cir. 1992), *petition for cert. filed*, No. 91-1881 (May 26, 1992). But § 510, which the Fifth Circuit interpreted, expressly provides that "[t]he provisions of section 502" —which the Court applied in *Firestone*, 489 U.S. at 116-118 — "shall be applicable in the enforcement of this section." The Fifth Circuit erred in ignoring this Congressional mandate.

While the Fifth Circuit apparently believed that its position was necessary to avoid a "gap" in the enforceability of § 510, there is no such gap.[5] As the Court made clear in *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478, 486 (1990), the "prototypical" § 510 case is one where the plaintiff has been fired before he or she would meet the final requirement for vesting in benefits already accrued. In such a case, the plaintiff meets the *Firestone* standard because there is a colorable claim to those accrued benefits.[6]

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[5] If there were any enforceability gap it would of course be the province of Congress, not the courts, to address the situation. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987) (ERISA creates a "comprehensive civil enforcement scheme that represents a careful balancing" and provides " 'strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.' ") (citation omitted).

[6] By contrast, the only claim former employees who have already vested and received all their accrued benefits could bring under § 510 would be

(Footnote continued)

In finding that "participant" has multiple and inherently inconsistent meanings within ERISA, the Fifth Circuit's holding also violates the "normal rule of statutory construction that 'identical words used in different parts of the same act are intended to have the same meaning.' " *Sorenson v. Secretary of the Treasury*, 475 U.S. 851, 860 (1986) (quoting *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934) (quoting *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932))); *see also Patterson*, 60 U.S.L.W. at 4553-54, (Scalia, J., concurring) ("consistency of usage within the same statute is to be presumed"). This rule is all the more forceful when the word in question has been given a single statutory definition. *See, e.g., Sierra Club v. Clark*, 755 F.2d 608, 613-14 (8th Cir. 1985) (defined term "conservation" must have same meaning throughout Endangered Species Act).

The Court of Appeals apparently believed that its departure from the holding in *Firestone* was called for by the subsequent decision in *McClendon*, 111 S. Ct. at 486. *McClendon*, however, was an action under ERISA § 510 by an individual who alleged that he *had not received* all his accrued plan benefits; it does not provide any support for authorizing actions by former employees *who have received* all their accrued plan benefits.[7]

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premised on the argument that they were terminated to prevent them from continuing to earn additional vested benefits. Such a claim is essentially indistinguishable from a claim that an employee was "wrongfully" terminated for the purpose of saving the employee's salary – a perfectly legitimate ground for making an employment decision.

While several Courts of Appeals have indicated that under some circumstances such a claim might be brought, *e.g., Conkwright v. Westinghouse Electric Corp.*, 933 F.2d 231, 236-37 (4th Cir. 1991) (stating § 510 provides such a cause of action, but plaintiff failed to meet burden of showing employer's intent), we respectfully submit that Congress never intended to create such an extraordinary cause of action, which would open the gates of the federal courts to any discharged employee who happened, at some point, to have had some relationship to an ERISA plan. It is therefore not surprising that Congress did not provide standing for former employees to bring such claims in federal court.

[7] The suggestion that *McClendon* expanded ERISA's remedial scheme by allowing suits for damages has been rejected by every appellate court that has

(Footnote continued)

CONCLUSION

ERIC on behalf of its members respectfully urges that the petition for writ of certiorari should be granted.

Respectfully submitted,

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June 1992

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considered it. *Novak v. Andersen Corp.*, No. 91-1957MN, 1992 U.S. App. LEXIS 6463 (8th Cir. Apr. 9, 1992); *Harsch v. Eisenberg*, 956 F.2d 651, 659-60 (7th Cir. 1992), *petition for cert. filed*, No. 91-1835 (May 11, 1992); *McRae v. Seafarers' Welfare Plan*, 920 F.2d 819, 821 n.7 (5th Cir. 1991); *accord Roberts v. Thorn Apple Valley. Inc.*, 784 F. Supp. 1538, 1541 (D. Utah 1992).

APPENDIX

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THE ERISA INDUSTRY COMMITTEE

MEMBER LIST

June 1992

Aetna Life & Casualty
Alexander & Alexander Inc.
Allied-Signal Inc.
Aluminum Company of America
AMAX Inc.
American Express Co.
American Home Products Corp.
American International Group
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American Telephone & Telegraph Co.
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The Prudential Insurance Co.

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE ASSOCIATION OF PRIVATE PENSION AND WELFARE PLANS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1881

MOBIL OIL CORPORATION, THE RETIREMENT PLAN OF MOBIL OIL CORPORATION, and REX ADAMS,
Petitioners,

v.

GERALD W. CHRISTOPHER, CHARLES L. PRUNTY, and BILLY G. TURNER,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE ASSOCIATION OF PRIVATE PENSION AND WELFARE PLANS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS

The Association of Private Pension and Welfare Plans ("APPWP") is a nonprofit organization founded in 1967 to protect and foster the growth of this country's private employer-sponsored employee benefits system. The over four hundred members of the APPWP include both large and small employers that sponsor benefit plans governed by the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), and also include plan support organizations such as investment firms, banks, insurers, actuarial firms and consulting firms, and benefits professionals. Collectively, the APPWP's members have sub-

stantial experience in retirement benefit plans of all types, including voluntary early retirement programs.

The APPWP has received consent to file this brief from both Petitioners and Respondents. Their letters of consent have been lodged with the Clerk of this Court.

REASONS FOR GRANTING THE WRIT

In this case, the Fifth Circuit effectively rejected this Court's common sense construction of the term "participant" under § 3(7) of ERISA, 29 U.S.C. § 1002(7),[1] in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). In its place, the Fifth Circuit adopted a greatly expanded definition of "participant" that would expose ERISA plans and employers to substantially increased litigation by former employees who are not participants under ERISA § 3(7), as that term has been interpreted by this Court in *Firestone*.[2]

Not only does the Fifth Circuit's construction of this term greatly expand ERISA's definition of participant, it threatens the viability of all voluntary early retirement programs. If allowed to stand, the Fifth Circuit's ruling will grant standing to sue under ERISA to virtually every former employee who elects to retire and receive enhanced benefits under a retirement plan, rather than remain employed with the possibility of receiving lesser

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[1] ERISA § 3(7) provides that:

> The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

[2] The Fifth Circuit appears to concede that plaintiffs do not have standing under *Firestone*. *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209 (5th Cir. 1992), *reprinted in* Appendix to the Petition for Writ of Certiorari, at 21a-22a [hereinafter "Pet. App."].

benefits. All such a former employee need do under the Fifth Circuit's test of standing is claim that he "would be" an ERISA participant "but for" an alleged constructive discharge under ERISA § 510, 29 U.S.C. § 1140. Pet. App. 22a-23a, 26a.[3] At a time when many employers are being forced to reduce their workforces, this result undercuts the ability of employers to offer voluntary early retirement programs to current participants as a valuable alternative to lay-off or termination. Moreover, this result seriously undermines the balance struck by Congress in ERISA, by imposing substantial and unpredictable litigation costs on plans and employers, and thereby adversely affecting current participants, while at the same time providing no additional protection for individuals who have already received their full plan benefits.

I. BY UPSETTING ERISA'S CAREFULLY CRAFTED BALANCE BETWEEN BENEFIT PROTECTION AND BENEFIT PLAN COSTS, THE FIFTH CIRCUIT'S DECISION THREATENS THE EXISTENCE OF VOLUNTARY EARLY RETIREMENT PROGRAMS

A. Voluntary Early Retirement Programs Are a Recognized, Valuable Option for Employers and Employees That Is Threatened by the Fifth Circuit's Decision.

This case involves an amendment to Mobil's Retirement Plan, which had the effect of restricting the availability of the plan's lump sum distribution option. Mobil announced the amendment in advance of its effective date to provide eligible employees a six-month window period

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[3] Among other things, ERISA § 510 makes it unlawful "to discharge . . . a participant . . . for exercising any right to which he is entitled under the provisions of an employee benefit plan, this title [I of ERISA, 29 U.S.C. §§ 1001-1168], section 3001 [29 U.S.C. § 1201], or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this title, or the Welfare and Pension Plans Disclosure Act."

within which to elect to retire with enhanced pension benefits under the terms of the plan as in effect prior to the amendment. Although the precise circumstances of this case were somewhat unusual, the effect of the amendment on eligible employees was not.

Every year, numerous employers adopt early retirement incentive programs that permit employees to retire earlier than they had planned, with retirement benefits more attractive than those to which they would otherwise be entitled.[4] Such early retirement incentive programs, referred to as "window" plans because they are limited in time, are entirely lawful. Indeed, both their validity and their importance has been recognized recently by Congress and the Internal Revenue Service. *See* H.R. Rep. No. 664 at 43-45; S. 1511 Final Substitute: Statement of Managers, 136 Cong. Rec. S13,594, S13,596-97 (1990) ("Statement of Managers"); Nondiscrimination Requirements for Qualified Plans, 56 Fed. Reg. 47,524,

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[4] As Congress recently observed, since 1978, "there has been a dramatic rise in the number of early retirement incentive programs used by employers." House Comm. on Education and Welfare, The Older Workers Benefit Protection Act, H.R. Rep. No. 664, 101st Cong., 2d Sess. 43 (1990). A 1990 survey of 145 randomly selected companies found that 44% of the surveyed companies had offered window plans during the preceding six years, with over two-thirds of such plans being offered during 1988, 1989, and the first two months of 1990. Towers, Perrin, Forster & Crosby, *TPF&C Survey of Window Plans* 1 (Apr. 1990) [hereinafter "TPF&C Survey"]. Current news reports also demonstrate the popularity of such programs among both public and private employers. *See, e.g.*, 19 Pens. Rep. (BNA) 787-88 (May 4, 1992) (Commonwealth of Massachusetts program offered to 7,000 state employees); 19 Pens. Rep. (BNA) 684 (Apr. 20, 1992) (program collectively bargained for by City of Pittsburgh and Fraternal Order of Police); 19 Pens. Rep. (BNA) 490 (Mar. 23, 1992) (Chevron program offered to 35,000 domestic employees); *id.* (Kansas Power & Light Co. and Kansas Gas and Electric Co. programs offered to union and non-union employees); 19 Pens. Rep. (BNA) 429 (Mar. 9, 1992) (Digital Equipment Corp. program offered to over 10 percent of domestic workforce).

47,531 (Sept. 19, 1991) (Preamble to Treas. Regs. § 1.401(a)(4)-1 to -13) (noting simplified testing method for retirement window benefits); Rev. Proc. 92-42, 1992-22 I.R.B. 41 (revoking ruling that inadvertently impaired window benefits for non-highly compensated employees).

Window plans are an important option for employers who decide to reduce their workforces or to curtail future accruals under their employee benefit plans for a variety of legitimate business reasons. Whatever the underlying reasons, however, a window plan is designed and adopted to encourage certain employees to terminate their employment voluntarily, in the hope of avoiding involuntary terminations or lay-offs. *See, e.g.*, H.R. Rep. No. 664 at 45; Statement of Managers, 136 Cong. Rec. at S13,596; 19 Pens. Rep. (BNA) 429, 490, 787-88 (1992). To this end, employees who separate from service under a window plan are offered enhanced employee benefits as incentives.[5]

Window plans are important not only to employers, but to employees as well. They permit employees to choose between voluntary early retirement and continued employment, rewarding those employees who choose early retirement with enhanced benefits they would not otherwise have received, and, in cases where the employer must reduce its workforce, preserving the employment of others who were threatened with termination or layoff.[6]

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[5] Some examples of such enhanced benefits include lump-sum severance payments and extended health benefits, *Martin v. General Motors Corp.*, 753 F. Supp. 1347, 1350 (E.D. Mich. 1991); unreduced (non-discounted) early retirement benefits, *Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 433 (4th Cir. 1986); lump-sum retirement benefit payments, *Carpenter v. Trans World Airlines, Inc.*, 1991 U.S. Dist. LEXIS 1293 (N.D. Ill. 1991); increased retirement benefits, *Fischer v. Philadelphia Elec. Co.*, 1991 U.S. Dist. LEXIS 3076 (E.D. Pa. 1991); unreduced survivor benefits and life insurance benefits, *Saporito v. Combustion Eng'g, Inc.*, 843 F.2d 666, 669 (3d Cir. 1988), *vacated*, 489 U.S. 1049 (1989).

[6] One recent study found that 50% or more of the eligible employees had elected early retirement in more than 70% of the

As Congress recognized, in assuring that recent age discrimination amendments would not preclude voluntary, non-discriminatory window plans, "employees may welcome the opportunity to participate in such programs, and [the Committee] do[es] not intend to deprive employees of such opportunities or to deny employers the flexibility to offer such programs. . . ." Statement of Managers, 136 Cong. Rec. at S13,596.

Nonetheless, certain employees, like plaintiffs here, conclude by hindsight that none of their options is desirable even in light of the enhanced benefits. *E.g.*, *Stanton*, 792 F.2d 432; *Carpenter*, 1991 U.S. Dist. LEXIS 1293. In view of the prevalence of window plans, the Fifth Circuit's decision can be expected to increase dramatically the frequency of claims of constructive discharge by former employees who retire with their full vested benefits. Under the court of appeals' analysis, every former employee who retires because of some event that "relates to" an employee benefit plan (within the meaning of ERISA § 514) would be able to sue his former employer simply by identifying some other event or occurrence about which, he alleges, he should have been informed. Thus, such an employee would have standing to sue even though he had received full payment of his vested benefits or even enhanced benefits under the plan and even though his former employer complied fully with the applicable notice requirements of ERISA.[7]

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surveyed plans. TPF&C Survey, at 5. *See also* H.R. Rep. No. 664 at 44:

> [I]t is clear that a wide variety of early retirement incentive plans may help employers and workers meet problems arising from the impact of age on employment, or promote the employment or retention of older workers. . . .

[7] In connection with their age discrimination claims, plaintiffs alleged actionable concealment with respect to (1) Mobil's failure to notify its employees until October 1985 of the amendment providing for a discretionary waiver of the $450,000 eligibility threshold, and (2) Mobil's "awareness that applicable tax law precluded" in-

B. The Limitation of Standing to "Participants" Implements Congress' Purpose to Protect Employees' Benefits, Without Imposing Excessive Costs on Employers Offering Voluntary Early Retirement Programs.

The principal purpose of ERISA is "to promote the interests of employees in employee benefit plans" and to protect them against the loss of benefits promised to them under their employer's benefit plans. *Firestone*, 489 U.S. at 113 (quoting *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 90 (1983), and citing *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985)); *Blessitt v. Retirement Plan for Employees of Dixie Engine Co.*, 848 F.2d 1164, 1176 (11th Cir. 1988) (en banc); *see also* ERISA § 2, 29 U.S.C. § 1001 (Congressional Findings and Declaration of Policy). At the same time, Congress was concerned not to burden plans so heavily by ERISA's requirements that "employers respond . . . by decreasing benefits under existing plans or slowing the rate of formation of new plans. . . ." H.R. Rep. No. 807, 93d Cong., 2d Sess. 15 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670, 4682. The various provisions of ERISA accordingly reflect Congress' "careful balancing" of the need to promote and protect employees' benefits "against the public interest in encouraging the formation of employee benefit plans." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987) (§ 502(a) enforcement scheme); *see also* H.R.

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creasing the lump sum threshold. Pet. App. 4a. The waiver amendment was adopted in October or November of 1984, in response to concerns expressed by the agent reviewing Mobil's request for a Service determination that the Retirement Plan continued to qualify for favorable tax treatment. *See* Pet. App. 4a. Under ERISA, the plan was not required to provide a summary of the amendment to participants and beneficiaries until 210 days after the close of the plan year in which the amendment was adopted.

As to Mobil's alleged awareness that increasing the lump sum threshold was contrary to applicable tax law, that assertion is refuted by the issuance of a favorable determination letter by the Service in November 1984. Pet. App. 4a.

Rep. No. 533, 93d Cong., 2d Sess. 1-2 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4639-40 (projected cost of each provision was analyzed in relation to anticipated benefit).

The civil enforcement provisions of ERISA § 502, "one of the essential tools for accomplishing the stated purposes of ERISA," *Dedeaux*, 481 U.S. at 52, implement the balancing of benefit protection against the expense to plans and employers, in part, by conferring the right to sue only upon four specified classes of individuals: participants, beneficiaries, fiduciaries, and the Secretary of Labor.[8] The civil remedies provided by section 502 are exclusive. *Id.* at 54. They permit a former employee to bring suit only if he is a "participant" (or within another of the specified classes),[9] because only if a former employee is a participant—someone who "is or may become eligible to receive a benefit," ERISA § 3(7)—can he assert any claim for benefits, the core concern of ERISA. If a former employee is not a participant, then the balance of benefit protection against plan costs tilts against the individual; the cost to his former employer or plan of defending against his claims necessarily outweighs the concern for protection of his plan benefits, since he is entitled to none.[10] The Fifth Circuit's standing analysis in this case, however, undermines the Congressionally-mandated balance by permitting suits where a former employee's plan benefits have been fully protected, *i.e.*,

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[8] This Court has noted that "the common interest shared by all four classes is in the financial integrity of the plan." *Russell*, 473 U.S. at 142 n.9. A participant's interest in the fiscal soundness of the plan, of course, follows directly from his interest in receiving his contractually defined benefits.

[9] Plaintiffs do not claim standing for purposes of ERISA on any basis other than as participants in Mobil's Retirement Plan.

[10] A claim alleging the loss of unearned benefits to be accrued in the future is not a claim for ERISA-protected benefits. *See infra* pp. 16-17.

they have been fully paid to that former employee, and his claim is for his job.

Notwithstanding the Fifth Circuit's apparent view to the contrary, ERISA § 510 is equally consistent with Congress' purpose to protect employee plan benefits without imposing undue costs on plans and employers. Not only does section 510 provide explicitly that it shall be enforced under section 502, but, like section 502, its provisions are limited to the protection of plan benefits. Section 510 does not confer on former employees a substantive right to be employed simply because the employer has a benefit plan, the employee participated in a benefit plan, or the employee left his job under circumstances that related to a benefit plan. Rather, section 510 only establishes an employee's more limited right not to be discharged to prevent him from attaining plan benefits or for exercising a right related to his plan benefits. Where, as here, a former employee's plan benefits have been fully protected and paid to him in a lump sum, and the calculation and amount of that sum is not disputed, the concerns addressed by section 510 are not raised.

In the face of Congress' clear limitation of ERISA standing to "participants," the potential costs to plans and employers of the court of appeals' ruling should not be underestimated. Many of the thousands of employees who retire each year under window plans and receive full payment of their contractually defined benefits may nonetheless have second thoughts about their decision to retire. If they are permitted to go forward with ERISA litigation by alleging merely that they "would be" participants "but for" some event that came to their attention subsequent to their retirement (Pet. App. 26a), ERISA's purpose to protect employee benefits will not be served. The costs of litigation alone will unquestionably reduce the amounts available to provide benefits for persons who are participants.[11] Moreover, to the extent that window plan

[11] *See* H.R. Rep. No. 779, 93d Cong., 2d Sess. 14 (1974) (pension plan cost "is an important factor in determining whether any

retirees potentially have standing to sue under the Fifth Circuit's analysis, their well-advised former employers probably should treat them as "participants" for other purposes of ERISA as well, forwarding plan documents and responding to their requests for plan information. Ultimately, the prospect of increased litigation and the imposition of substantial additional costs will operate to discourage employers from offering window plans at all.

II. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S CONSTRUCTION OF ERISA'S DEFINITION OF "PARTICIPANT"

A. The Definition of "Participant" as Construed in *Firestone* Is Applicable to All Causes of Action under ERISA Title I.

The Fifth Circuit predicated its standing analysis in this case on the assertion that *Firestone* does not "reduce the standing question to a straightforward formula applicable in all cases. This seems particularly so in cases involving allegations of discharge." Pet. App. 22a. Thus, the court effectively held that a different definition of "participant" should apply in discharge cases than in other ERISA matters. This ruling by the court of appeals is directly at odds with both ERISA itself and *Firestone*.

First, ERISA contains only one definition of "participant"—that found in ERISA § 3(7). That definition, like all other definitions in ERISA § 3, is applicable by its terms "[f]or purposes of this title." The referenced title is Title I of ERISA, §§ 2-608, 29 U.S.C. §§ 1001-1168, which contains all of the enforcement provisions that may even arguably be relied upon by plaintiffs in this case, including sections 502 and 510.[12]

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particular retirement plan will be adopted and in determining the benefit levels if a plan is adopted . . .").

[12] ERISA Title IV, 29 U.S.C. §§ 1301-1461, relating to plan termination insurance and the Pension Benefit Guaranty Corporation,

The provisions of ERISA § 502 enumerate the various types of claims that may be asserted, including claims to enforce ERISA's disclosure provisions, *id.* at (a)(1)(A), (a)(4); claims to recover plan benefits or to enforce or clarify the terms of a plan relating to benefits, *id.* at (a)(1)(B); claims to remedy breaches of fiduciary duty, *id.* at (a)(2); and claims:

> (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan. . . .

Id. at § 502(a)(3).

No provision of section 502, however, permits claims to be brought by anyone other than a participant, a beneficiary, a fiduciary, or the Secretary of Labor. And ERISA § 510 specifically provides that ERISA § 502 is applicable to its enforcement.

Second, in *Firestone* this Court construed ERISA's definition of "participant," and reached a result contrary to that reached by the Fifth Circuit in this case. In so doing, this Court addressed every aspect of the definition that could conceivably confer standing on plaintiffs in this case. Plaintiffs are not and never were members of an "employee organization" within the meaning of ERISA, *see* ERISA § 3(4), 29 U.S.C. § 1002(4), and do not claim that they are participants because they have eligible beneficiaries under Mobil's Retirement Plan. Thus, the only part of the definition that might afford them participant status is the portion specifically at issue in *Firestone*, *e.g.*, "any employee or former employee . . . who is or may become eligible to receive a benefit." ERISA § 3(7), 29 U.S.C. § 1002(7).

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also includes provisions for enforcement through civil actions by, *inter alia*, "a plan partipant." 29 U.S.C. § 1451(a)(1). Plaintiffs' claims patently do not relate to Title IV.

The fact that the controversy in *Firestone* concerned disclosure obligations rather than an alleged constructive discharge does not support the Fifth Circuit's rejection of *Firestone* here. It is clear from this Court's opinion that *Firestone*'s construction of "participant" applies to every use of that term in Title I of ERISA, in accordance with the "normal rule of statutory construction," which "assumes that 'identical words used in different parts of the same act are intended to have the same meaning.'" *Sorenson v. Secretary of the Treasury*, 475 U.S. 851, 860 (1986) (quoting *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934) (quoting *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932))). *See also Patterson v. Shumate*, No. 91-913, slip op. at 5 n.2 (U.S. June 15, 1992) (opinion of the Court); *id.* at 1 (Scalia, J., concurring).

Exactly like this case, the *Firestone* case involved the Third Circuit's attempt to incorporate a special definition of the term "participant" into certain substantive provisions of Title I. In particular, the Third Circuit had ascribed a special, expansive meaning to the term "participant" for purposes of ERISA's disclosure provisions: For purposes of a participant's right to request copies of certain plan documents under ERISA § 104(b)(4), 29 U.S.C. § 1024(b)(4), said that court, "participant" includes someone who *claims* to be entitled to benefits. Moreover, at least for purposes of a participant's ability to enforce his right to disclosure, the Third Circuit concluded that section 502(a)(1) of ERISA authorizes suit by anyone who "claims to be" a participant. *See Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134, 152, 153 (3d Cir. 1987), *modified*, 489 U.S. 101 (1989).

This Court, however, squarely rejected a provision-by-provision approach to defining "participant." In this Court's view, the Third Circuit's analysis was incorrect because "it strays far from the statutory language" of ERISA § 3(7): "To say that a 'participant' is any per-

son who claims to be one begs the question of who is a 'participant' and renders the [statutory] definition . . . superfluous." *Firestone*, 489 U.S. at 117. The Fifth Circuit's analysis in this case, which seeks to modify and expand the statutory definition of "participant" in cases alleging constructive discharge under section 510, suffers from the same fundamental defect. If accepted, the Fifth Circuit's analysis would lead to the absurd result that the term "participant" in section 502 means one thing if a claimant sues to remedy an alleged violation of section 510 and something else if his suit involves a different ERISA claim.

B. The Construction of "Participant" Adopted by the Fifth Circuit Was Expressly Rejected in *Firestone*.

The Fifth Circuit adopted a "but for" test to determine whether a claimant in a discharge case under ERISA § 510 has standing to sue.

> [Plaintiffs'] allegations do at least suggest an assertion that they were constructively discharged in violation of section 510 and that *but for* Mobil's nondisclosure they *would be* covered employees with standing to challenge the plan amendment.

Pet. App. 26a (emphasis supplied).

Significantly, the court of appeals did not decide that former employees in plaintiffs' position are participants within the meaning of ERISA § 3(7)—a conclusion foreclosed by the statutory language and *Firestone*, as that court recognized (Pet. App. 21a-23a)—but rather that their lawsuit could proceed because they are claiming that they should be participants.

This type of "but for" analysis is no different than the analysis employed by the Third Circuit and rejected by this Court in *Firestone*, because it would authorize suit by a group of persons who are not, but claim to be, participants. Unlike the Fifth Circuit, other federal

courts have understood that *Firestone* forecloses standing where a former employee is not, but "claims to be" or "would be," a participant in the benefit plan at issue. *E.g.*, *Teagardener v. Republic-Franklin Inc. Pension Plan*, 909 F.2d 947, 951-52 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 678 (1991); *Winchester v. Pension Comm. of Michael Reese Health Plan, Inc. Pension Plan*, 942 F.2d 1190, 1193 (7th Cir. 1991); *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463, 474 (10th Cir.), *cert. denied*, 111 S. Ct. 252 (1990); *Shawley v. Bethlehem Steel Corp.*, 784 F. Supp. 1200, 1205-06 (W.D. Pa. 1992); *Jones v. AT&T Co.*, 1992 U.S. Dist. LEXIS 4139 (E.D. Pa. 1992).

C. This Court's Decision in *Ingersoll-Rand Co. v. McClendon* Is Consistent with *Firestone*.

Notwithstanding the clear import of *Firestone* and the fact that ERISA contains a single definition of "participant," the Fifth Circuit found support for its expansive reading of "participant" for purposes of discharge cases in *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478 (1990). *See* Pet. App. 22a. *Ingersoll-Rand* held that a state law discharge claim was preempted explicitly by ERISA § 514, 29 U.S.C. § 1144, and implicitly by section 510, where the employer's alleged motive was to cease contributions to, and not pay benefits under, its pension plan on behalf of the employee. *Ingersoll-Rand*, however, simply is not apposite to this case.

First, *Ingersoll-Rand* is a preemption case, not a standing case. The opinion neither raises nor discusses any issue as to the discharged employee's standing or status as an ERISA "participant," and *Firestone* is not mentioned. Nonetheless, the Fifth Circuit inferred that *Ingersoll-Rand* must modify or limit the scope of *Firestone*, on the ground that the preemption ruling implied that the discharged employee would have standing to seek an ERISA remedy. The court of appeals concluded that "it would seem [] logical to say that but for the employer's

conduct alleged to be in violation of ERISA, the employee *would* be a current employee with a reasonable expectation of receiving benefits. . . ." Pet. App. 22a-23a (emphasis in the original).

This reading incorporates precisely the "but for" or "claims to be" principle of participant standing that *Firestone* rejected only the previous year. Moreover, the standing analysis that the Fifth Circuit inferred from *Ingersoll-Rand* would have been unnecessary to this Court's decision. The essence of McClendon's claim was that he was discharged so as to prevent his accrued benefit under his employer's pension plan from increasing or vesting. Taking the well-pleaded allegations of his complaint as true, as a court must in deciding the threshold question of standing, *e.g.*, *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 109 (1979); *Warth v. Seldin*, 422 U.S. 490, 501-02 (1975); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), he was a former employee "with a 'colorable claim' to vested benefits" under the plan, *Firestone*, 489 U.S. at 117, because, under ERISA § 510, he could not be discharged to prevent the attainment of a vested right to his accrued benefit. Also, he was a former employee who "may become eligible" for benefits, because he could assert a "colorable claim that (1) he will prevail in a suit for benefits. . . ." *Id.* Plaintiffs here, by contrast, have not and cannot assert any claim for benefits under Mobil's Retirement Plan. They were paid the full amount of their vested benefits under the plan in a lump sum upon their retirement, and they have never disputed the calculation or amount of that payment.

Finally, even if McClendon were not a participant under *Firestone*, the fact that his state law claim is preempted by ERISA would not require that he have an ERISA remedy. This Court and other courts repeatedly have recognized that ERISA may preempt a state law cause of action even where a similar federal remedy is unavailable. *E.g.*, *Dedeaux*, 481 U.S. at 53-54; *Lee v. E.I. Du Pont de Nemours and Co.*, 894 F.2d 755, 757

(5th Cir. 1990); *Lister v. Stark*, 890 F.2d 941, 946 (7th Cir. 1989), *cert. denied*, 111 S. Ct. 579 (1990). In such cases, the effect of preemption may be to deny plaintiffs any remedy for alleged wrongdoing that relates to an employee benefit plan. This result may appear inequitable, but it is the consequence of policy choices that were and are appropriately made by Congress. Congress could, for example, have created a special definition of participant for the purpose of the enforcement provisions of ERISA, or expanded the categories of persons entitled to sue, but it did not. It is not the province of a court to rewrite or distort a statutory provision when the court perceives that the statutory results may be unfair.[13] *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 376-77 (1990); *see also Russell*, 473 U.S. at 147 (court should not tamper with ERISA statutory scheme).

D. Plaintiffs Are Not Participants Under ERISA and *Firestone*.

As former employees, plaintiffs have standing to pursue an ERISA claim against Mobil only if they have either a colorable claim to vested benefits from the Retirement Plan or a reasonable expectation of returning to covered employment. *Firestone*, 489 U.S. at 117. Plaintiffs clearly do not satisfy either part of this test.

The Fifth Circuit recognized that plaintiffs cannot assert any claim to vested benefits, since they received full payment of their vested benefits under the plan at the time of their retirement. Pet. App. 21a. It is well established that, under these circumstances, plaintiffs' claim is necessarily one for future, unearned benefits rather than for vested benefits. *E.g.*, *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463, 474 (10th Cir. 1990); *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan*, 883 F.2d

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[13] In this case, the Fifth Circuit properly held that plaintiffs' state law claims were preempted, because "the basis of the claims themselves is the operation of the pension plan." Pet. App. 19a.

345, 349-50 (5th Cir. 1989); *Kuntz v. Reese*, 785 F.2d 1410, 1411 (9th Cir.) (per curiam), *cert. denied*, 479 U.S. 916 (1986). *See also* 29 C.F.R. § 2510.3-3(d)(2)(ii)(B) (individual who has received lump-sum distribution from pension plan is not "participant"). Therefore, the part of the *Firestone* test that confers standing on a discharged employee like McClendon, *see supra* p. 15, does not apply to plaintiffs here.

Plaintiffs also have not alleged facts that would demonstrate a reasonable expectation of returning to covered employment. Plaintiffs never sought reemployment; indeed, the only evidence of any desire to return is their prayer for reinstatement under their rejected age discrimination claims. Pet. App. 22a.[14] Neither a bare desire to return to work nor a prayer for reinstatement suffices to establish a "reasonable expectation" of returning to employment, *Winchester*, 942 F.2d at 1193; *Shawley*, 748 F. Supp. at 1205; *Carpenter*, 1991 U.S. Dist. LEXIS 1293, and the Fifth Circuit properly declined to find standing here on that basis. *See* Pet. App. 23a. Instead, as the courts that have considered this part of *Firestone* have agreed, a claimant's reasonable expectation must be established by facts independent of the pleadings, through a contractual or statutory right to be recalled to work. *Zydel v. Dresser Indus., Inc.*, 764 F. Supp. 277 (W.D.N.Y. 1991); *Baeten v. Van Ess*, 474 F. Supp. 1324, 1330-31 (E.D. Wis. 1979); *cf. Shawley*, 784 F. Supp. at 1205 (no reasonable expectation after contractual right to recall expired). Plaintiffs cannot make that showing here.

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[14] The Fifth Circuit affirmed the ruling of the district court that plaintiffs' claims under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634, were barred by the applicable statute of limitations. Pet. App. 13a.

CONCLUSION

If permitted to stand, the Fifth Circuit's decision will have far-reaching, adverse consequences for voluntary early retirement programs, without serving any benefit protection purpose. Accordingly, the petition for writ of certiorari should be granted and the decision below reversed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JUL 27 1992
OFFICE OF THE CLERK

No. 91-1881

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MOBIL OIL CORPORATION, THE RETIREMENT PLAN OF MOBIL OIL CORPORATION, and REX ADAMS,
Petitioners,

v.

GERALD W. CHRISTOPHER, CHARLES L. PRUNTY, and BILLY G. TURNER,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Was the Court of Appeals correct in holding that former employees may establish standing to sue for being involuntarily discharged in violation of § 510 of the Employee Retirement Income Security Act of 1974 ("ERISA") by proving, not merely alleging, that but for the violation of § 510, they would be current employees with a reasonable expectation of receiving benefits?

LIST OF PARTIES

Petitioners: (Defendants-Appellees below):

Mobil Oil Corporation, a subsidiary of Mobil Corporation (a publicly held corporation). A list of Mobil Oil Corporation's non-wholly-owned subsidiaries has been included in the Appendix to their petition [46a].

Retirement Plan of Mobil Oil Corporation

Rex D. Adams (a Vice President of Mobil Corporation)

Respondents: (Plaintiffs-Appellants below):

Gerald W. Christopher

Charles L. Prunty

Billy G. Turner

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1881

MOBIL OIL CORPORATION, THE RETIREMENT PLAN OF MOBIL OIL CORPORATION, and REX ADAMS,

Petitioners,

v.

GERALD W. CHRISTOPHER, CHARLES L. PRUNTY, and BILLY G. TURNER,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

At issue here is whether the Court of Appeals correctly held that standing to sue under ERISA § 510 may be established by former employees, notwithstanding their receipt of a lump sum payment of all their accrued pension benefits, if they prove: (1) that their employer's misrepresentations and concealment of certain material facts prior to the empolyees' "retirement" decision caused the retirements and rendered them involuntary in the same sense that an outright firing is an involuntary dis-

charge; and (2) that but for the violation of § 510, the respondents would in fact be current employees "eligible to receive a benefit of any type from an employee benefit plan." ERISA § 3(7).

I. COUNTERSTATEMENT OF THE FACTS.

Plaintiffs were each employed by Petitioner Mobil Oil Corporation ("Mobil") for more than 35 years. As part of their compensation, they earned retirement benefits, including a pension under a defined-benefit Retirement Plan (the "Plan"). For many years, such pensions were paid in the form of monthly annuities. But in 1977, Mobil amended the Plan to allow retiring employees to take their pensions in a lump sum, reduced to present value using a 5% discount rate. To qualify for this lump sum option, the retiring employee had to have $250,000 in accrued pension or had to show a personal net worth, exclusive of his Mobil pension, exceeding that figure.

A. The July 1984 Plan Amendment.

In late 1983 and early 1984, Mobil's Executive Committee began consideration of changes to the lump sum benefit. The 5% discount factor had made the lump sum far more valuable—approximately 40% more valuable—than the annuity benefit. The intervening years of inflation, including salary inflation, had made a majority of Mobil's employees eligible for the lump sum under the $250,000 test. Utilization of the lump sum option was becoming virtually universal. The Executive Committee wanted to increase the discount factor and the eligibility test or "threshold."

By May 1984, however, Mobil knew that Congress was likely to pass an amendment to ERISA that would prevent "cutbacks" in defined benefits, including "optional" forms of benefits such as Mobil's lump sum option. The proposed amendment, eventually enacted as part of the

Retirement Equity Act ("REA"), would not prohibit such "cutbacks," however, if made before July 30, 1984. Retirement Equity Act of 1984, Pub. L. No. 98-397, § 302 (d)(1), 98 Stat. 1426, 1451-52 (codified, as amended, 29 U.S.C. § 1001, Historical and Statutory Notes).

Mobil's Executive Committee acted quickly. On June 13, 1984, it adopted and on July 2, 1984, it announced a Plan amendment: (a) increasing the discount factor from 5% to 9.5% for benefits accrued after February 1, 1985; and (b) increasing the lump-sum eligibility threshold from $250,000 to $450,000, also effective February 1, 1985, to be increased thereafter by the consumer price index. The change in the threshold eligibility requirement was not made prospectively. That is, once the Plan amendment became effective, the new eligibility test would apply to all retirees and with respect to the entirety of their pension.

B. The Sixth-Month "Window" Retirement Program.

Ostensibly as a matter of fairness, Mobil also announced on July 2, 1984, a special, six-month "window" retirement program for those employees who were 55 or older before the new Plan amendment became effective. They could take their pension in a lump sum under the old $250,000 test—but only if they retired by January 1, 1985. As part of this window "program," Mobil waived certain advance notice requirements for electing the lump sum.

For more than 1,000 Mobil employees, the Plan amendment and the six-month window operated as an "early retirement" program—and an inexpensive one for Mobil, since it was not required to pay any "incentives" to encourage the early retirements. Indeed, Mobil's net savings for this "early retirement" program were nearly $300 million.

At the time it announced the Plan amendment and the "window" retirement program, Mobil informed its em-

ployees that the amendment was "subject to IRS approval" —i.e. an IRS determination that the Plan, as amended, would continue to meet the IRS' criteria for "favorable tax treatment." The plaintiffs and their fellow "window retirees" were led to believe that such IRS approval would be routine. After all, Mobil had the right to adopt the Plan amendment when it did. In fact, Mobil could have abolished the lump sum benefit altogether—so long as it did so before July 30, 1984, the effective date of the REA's "anti-cutback" provision.

To this point in events, Mobil's conduct did not violate ERISA. In particular, as to § 510 of ERISA, if retirement-eligible employees chose to "opt" for the lump sum benefit and to give up their jobs to get the lump sum, their retirements would not constitute unlawful discharges in violation of § 510. Instead, they would be making a conscious, albeit unwanted, decision to retire and to receive all their retirement benefits earned through the date of retirement.

C. The September 1984 Plan Amendment.

On July 16, 1984, Mobil submitted its application for a determination letter to the IRS. The chief concern was whether the new $450,000 threshold would "discriminate in favor of highly compensated employees," in violation of 26 U.S.C. § 401(a)(4). In September, the IRS agent reviewing the Plan amendment informed Mobil that he would not approve it, because it would indeed favor Mobil's "highly paid executives."

Although Mobil informed its Executive Committee of the IRS' rejection of the Plan amendment, it did not inform its rank and file. Instead, in late September 1984, it made a new amendment, incorporating into the amendment proposed in July, a right of each employee to apply for a waiver of the $450,000 threshold. This new Plan amendment reserved to Mobil "sole discretion" to grant such waivers "in individual cases for valid cause shown."

However, Mobil has admitted that the purpose and intended operation of the waiver clause was to prevent "statistical" discrimination in favor of highly compensated employees. Since eligibility for the lump sum option among Mobil's highly paid employees would be virtually universal even under the $450,000 test—a fact Mobil knew from internal and outside actuarial studies—the practical effect of the waiver clause was inescapable: it would negate the $450,000 threshold amendment.

D. Mobil's Misrepresentations and Concealments.

The IRS informally approved the new amendment in October. However, Mobil again made no announcement to its rank and file. It did not inform the employees that the IRS had rejected the originally proposed Plan amendment, that a new amendment had been adopted—after the July 30, 1984 effective date of the REA—or that employees now had a right to apply for a waiver of the $450,000 requirement.

To the contrary, Mobil actively concealed these facts from employees considering retirement under the "window" program. For example, in October 1984, Mobil prepared two memoranda concerning the IRS' approval of the new Plan amendment. One was sent to Mobil's Executive Committee and correctly described the amendment as adopted the previous month, including the new waiver clause. The second memorandum, addressed to Mobil's employee relations managers throughout the country—who referred only to the Plan amendment in the form announced on July 2, 1984.

Several employees, including plaintiffs, who were considering retirement under the window program asked their respective employee relations departments about possible exceptions to the $450,000 requirement. They were consistently told that no exceptions were possible.

On November 12, 1984, one of Mobil's executives prepared a "confidential memorandum" concerning plans for

administering the waiver clause. This document discusses "adverse comments" made to the IRS about the July 2, 1984 version of the Plan amendment by employees who were considering retirement under the window program. The IRS had responded to the employees, explaining only that the amendment "did not adversely affect the qualification of the Plan." This internal Mobil memorandum then expresses relief that the IRS had made "no mention of the additional amendment required by the IRS [i.e., the waiver clause]."

Mobil announced the IRS' approval of the Plan amendment to its employees on December 21, 1984—just ten days before the end of the "window" program. This announcement specifically referred to the July 2, 1984 announcement and implied that the IRS had approved the Plan amendment as announced in July. This December announcement also did not disclose the waiver amendment or the date of its adoption.

E. Mobil's Violations of ERISA § 510.

Plaintiffs and their fellow "window retirees" left Mobil on January 1, 1985, believing that the Plan amendment announced by Mobil the previous July had been approved by the IRS and without knowing that the true Plan amendment had been made in September 1984. Plaintiffs also retired not knowing of their right under the Plan amendment to apply for a waiver of the $450,000 requirement. Had plaintiffs known of the IRS rejection, they, through their unions and attorneys, would have learned that their rights to the lump sum benefit under the $250,000 test had been "grandfathered in" by the REA. Similarly, had plaintiffs known of the right to apply for a waiver, each would have done so, instead of forfeiting his job—especially if provided information about the purpose and intended operation of the waiver clause.

Mobil never did announce the true Plan amendment in the form adopted in September 1984. Instead, in October 1985, Mobil announced the "waiver clause," without specifying when it had been adopted and without explaining that it was part of the threshold amendment. Mobil made this announcement only to then-current employees. Plaintiffs did not discover Mobil's fraudulent conduct until late 1988, as a result of discovery and trial in a case brought by one of the "window retirees" in Colorado.[1]

II. COUNTERSTATEMENT OF PROCEEDINGS.

Plaintiffs brought this action on July 7, 1989, alleging that Mobil's conduct violated the Age Discrimination in Employment Act ("ADEA") and state law. Plaintiffs also asserted that if their state law claims were preempted by ERISA, then Mobil's conduct constituted a violation of ERISA, specifically § 510.

Mobil filed dispositive motions on all claims, including a motion to dismiss plaintiffs' ERISA claims on grounds that plaintiffs were not "participants" seeking to recover benefits under ERISA § 502, 29 U.S.C. § 1132, and they therefore lacked standing to sue under ERISA. On June 22, 1990, the District Court granted summary judgment for Mobil on the ADEA claims, finding those claims barred by statutes of limitations. The trial court dismissed the state law claims based on ERISA preemption,

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[1] The Colorado action, denominated *Mitchell v. Mobil Oil Corp.*, Civil Action No. 86-Z-585, asserted claims for violation of the Age Discrimination in Employment Act, of ERISA, and of state law. Mitchell's theory was that Mobil's July 2, 1984 announcement itself worked a "constructive discharge" of Mitchell. Although Mitchell also offered evidence of Mobil's fraudulent conduct *after* the July 2, 1984 announcement—solely as a means of showing that the announcement was willful and intentional—he did not claim at trial that his retirement had been fraudulently procured. Ultimately, his "constructive discharge" theory failed under both ADEA and ERISA. *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463 (10th Cir.), *cert. denied*, 111 S.Ct. 252 (1990).

and it ruled that plaintiffs did not have standing to sue as "participants" under ERISA § 502(a).

The Fifth Circuit affirmed the ADEA ruling and the ERISA preemption ruling, but reversed and remanded the district court's dismissal of plaintiffs' ERISA claims. *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209 (5th Cir. 1992). The Court found that dismissal on the pleadings of the contingent ERISA claims was premature, as plaintiffs' allegations indicated that they may have been discharged in violation of § 510 and that, but for Mobil's nondisclosures, they would be covered employees with standing to sue under § 510. The Fifth Circuit observed that it was possible plaintiffs could *prove* facts that would establish standing under ERISA § 510. The Fifth Circuit also noted that plaintiffs had sought reinstatement on their ADEA claims, and did not affirmatively indicate that reinstatement was not also sought under their ERISA claims.

Upon remand, plaintiffs have amended their Complaint, asserting claims under § 510 of ERISA. They allege that Mobil fraudulently procured their involuntary discharges, by interfering with their ERISA-protected right to receive the lump sum benefit under the $250,000 test, by inducing them to believe that they could exercise their right to the lump sum only by giving up their jobs, and by concealing from them and thus preventing them from exercising their right under the Plan to apply for a waiver of the $450,000 requirement. Plaintiffs seek equitable relief pursuant to ERISA § 502(a)(3) in the form of a "make whole" remedy. The case is now proceeding in the District Court for the Eastern District of Texas.

REASONS FOR DENYING THE WRIT

(1) The means by which a former employee may establish or prove his standing, as articulated by the Fifth Circuit's decision in this case, are consistent with the

statutory definition of "participant" under ERISA § 3(7) and are not inconsistent with any applications of that definition by this Court or any of the other circuits.

(2) The Fifth Circuit's decision on standing does not threaten the certainty or uniformity of ERISA plan administration.

(3) Review of the Fifth Circuit's decision would be premature. The grounds for standing recognized by the Fifth Circuit require *proof* of an ERISA § 510 claim that *in and of itself* caused plaintiffs to cease being "current employees." Standing here is not based on a mere claim or allegation of standing. Ultimately, plaintiffs may or may not establish standing in the District Court, but in any event the proper time for review by this Court would be after the lower courts have fully adjudicated the issue.

(4) If the Court were to review the Fifth Circuit's decision on standing purely as a legal formulation, it would find, again, that the formulation is not inconsistent with any prior decisions of this Court or of the other circuits; however, the principles articulated by the Fifth Circuit have not been significantly developed by the lower courts. In fact, in related litigation, the District Court for the District of Colorado on July 21, 1992 certified the very issue presented here for interlocutory review by the Tenth Circuit Court of Appeals under 28 U.S.C. § 1292(b). [32a.]

I. THE CONTROLLING STATUTORY PROVISIONS.

ERISA is comprehensive remedial legislation intended to provide the full range of legal and equitable remedies to redress and prevent violation of its provisions. S.Rep. No. 93-127, 93d Cong., 2d Sess., Reprinted in 1974 U.S. Code Cong. and Ad. News at 4871. As pertinent here, standing to bring civil actions to enforce ERISA rights and to redress violations is afforded to a "participant" of an employee benefit plan. ERISA § 502(a)(1) & (3),

29 U.S.C. § 1132(a)(1) & (3). A participant, as defined by ERISA § 3(7), is "any employee or former employee . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan." (emphasis added). 29 U.S.C. § 1002(7).

Under § 3(7), current employees who are eligible or who in the future may become eligible for plan benefits are "participants" for standing purposes. A former employee "may become eligible for benefits," and is therefore a "participant," if he has a "reasonable expectation of returning to covered employment" or a "colorable claim to vested benefits." *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 117 (1989); *Kuntz v. Reese*, 785 F.2d 1410, 1411 (9th Cir. 1986).

In relevant part, ERISA § 510 provides:

> It shall be unlawful for any person to discharge . . . a participant . . . for exercising any right to which he is entitled under the provisions of an employee benefit plan [or] this Subchapter . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan [or] this Subchapter. . . . 29 U.S.C. § 1140.

Mobil contends that a former employee cannot be a "participant" under this or any other provision of ERISA if he has received all the benefits he earned through the date he left "covered employment"—regardless of whether his departure was caused by his employer's violation of § 510. Mobil asserts that the only "exception" to this "rule" is where the former employee asks his employer to reinstate him before he sues under ERISA. Under that "exception," the presuit request for reinstatement, according to Mobil, may represent a "reasonable expectation of returning to covered employment," but only if the reinstatement would allow the employee to "satisfy eligibility requirements" for a benefit not satisfied before his wrongful discharge.

These are the "rule" and the "exception" Mobil urged below and which it advances on its Petition. But neither the decisions of this Court nor of the circuits support the "rule" or the "exception."

II. THE FIFTH CIRCUIT'S DECISION IS CONSISTENT WITH FIRESTONE AND THE ONLY INTERPRETATION OF FIRESTONE CONSISTENT WITH SECTION 510.

Under Mobil's argument, many persons who might be harmed by conduct proscribed by § 510 would lack standing to sue under that section. Any employee discharged for exercising his right to a fully vested ERISA benefit necessarily would have already received the vested benefit. He would no longer have a "colorable claim for vested benefits." He would not have a "reasonable expectation of returning to covered employment" to "attain eligibility for the benefit" because he had already obtained eligibility. Also, his expectation of returning to covered employment could be defeated by the employer or by circumstances entirely beyond the participant's control (e.g. if the employer goes out of business), making his request for reinstatement "unreasonable."

To illustrate, an employer offering a health plan and maternity leave as its only ERISA benefits might intentionally discharge a female worker immediately after her return from maternity leave, for exercising her ERISA rights. At the time of her discharge, she had received all earned and vested benefits, yet her discharge is obviously violative of § 510. She would lack standing, according to Mobil, however, because she would have no claim, colorable or otherwise, for "vested benefits" and no expectation of attaining eligibility for a vested benefit in the future. Additionally, if the circumstances of her discharge or events subsequent to the discharge made her reinstatement unlikely or an "unreasonable expectation," then she would lack standing on this ground as well.

Such a construction of *Firestone* would vitiate § 510 and allow the employer, through his own conduct viola-

tive of § 510, to defeat the employees' standing to remedy the violation. The Fifth Circuit recognized this, and thus rejected Mobil's restrictive interpretation of *Firestone*—the same interpretation advanced in its petition here. In doing so, the court used the plaintiff in *Ingersoll-Rand Co. v. McClendon*, 111 S.Ct. 478 (1990), as an example, not unlike the female employee discharged after returning from maternity leave:

> The Supreme Court's recent *McClendon* decision held that [Section 510] would foreclose the development of any state law cause of action for wrongful termination to prevent vesting of pension benefits. . . . The implication of the Court's holding that the discharged employee must look solely to ERISA for his remedy is that he would have standing to do so. Nevertheless, it is not readily apparent that he would have standing under the construction of *Firestone* urged by Mobil; he would be a former employee lacking both a claim for vested benefits and (unless he requested reinstatement) a reasonable expectation of returning to covered employment. It would be unusual if in that situation his ability to assert a claim at all turned on whether or not his requested relief included reinstatement; it would seem more logical to say that but for the employer's conduct alleged to be in violation of ERISA, the employee would be a current employee with a reasonable expectation of receiving benefits, and the employer should not be able through its own malfeasance to defeat the employee's standing. 950 F.2d at 1221 (citations omitted).

The Fifth Circuit recognized that, at the time of the alleged § 510 violation, each of these plaintiffs were "participants" in Mobil's Retirement Plan, and their standing to sue for that alleged violation cannot be defeated by the violation itself. Either their standing is to be determined *as of time of the wrongful acts*, i.e. when they were still "current employees" and thus "participants," or they must be treated in law as if they *had never left covered employment.*

Stated another way, if plaintiffs can prove the § 510 claims they allege, then they—as a matter of law—have continued to earn or accrue vested benefits, i.e., additional pension accumulations, which were not paid to them. Accordingly, they would *then* have claims for vested benefits not paid. Also, plaintiffs would *then* have more than merely a "reasonable expectation of returning to covered employment." They would have proven that they never should have lost their jobs in the first place.

III. THE FIFTH CIRCUIT'S OPINION DOES NOT CREATE STANDING BY A MERE ALLEGATION OR CLAIM OF STANDING.

Mobil's petition misapprehends an important aspect of the Fifth Circuit's decision in this case. The Fifth Circuit held that plaintiffs may establish standing to sue under § 510 only if they prove that their status as "former employees" was the result of a § 510 violation and not the result of their own actions. *See especially*, 950 F.2d at 1222. In other words, plaintiffs are required to show that their apparently conscious decision to take early retirement was in fact a fraudulently procured discharge in which plaintiffs' "conscious choice" was effectively negated by fraud. Proof of such fraud is required to render the "early retirements" truly involuntary in the same sense that the outright firing in *McClendon* was involuntary.

Thus, plaintiffs' standing is not established by a mere *claim* of fraudulent discharge. It requires proof of the violation:

> [T]he standing question and the merits of an employee's claim are unavoidably intertwined to some degree; whether a plaintiff has standing to assert ERISA rights may depend upon whether he can establish a discharge or some other conduct in violation of ERISA, but for which he would have standing. 950 F.2d at 1222 (emphasis added).

Thus, the Fifth Circuit did not run afoul of the principles in *Firestone* that plaintiffs either are or are not "participants" and that they cannot establish their status as "participants" by merely alleging or claiming that status. Here, the plaintiffs either are or are not participants—depending upon whether they *actually prove* that they would not have left covered employment but for Mobil's fraud in violation of § 510.

Requiring proof of an underlying violation as a prerequisite to standing, so that standing cannot be determined except upon the merits of the case, is not foreign to the law. *Gladstone, Realtors v. Bellwood*, 441 U.S. 91, n.31 (1979) ("it sometimes remains to be seen whether the factual allegations of the complaint necessary for standing will be supported adequately by the evidence at trial."); *Barrett Computer Services, Inc. v. PDA, Inc.*, 884 F.2d 214, 218-19 (5th Cir. 1989) (". . . in cases in which the merits of the claims asserted are intertwined with the jurisdictional issue of standing challenges to standing are frequently resolved in summary judgment proceedings . . . or at a trial on the merits.") *See also, Henry v. Black & Decker Inc.*, 779 F. Supp. 778, 784, n.4 (D.N.J. 1991).

In this case, the merits of respondents' ERISA claim are inextricably intertwined with the question of standing. The Fifth Circuit, in fact, held that: "[w]e emphasize that we have not determined that appellants will be able to establish a violation of § 510, only that they should be allowed to do so." [25a.]

IV. THE FIFTH CIRCUIT'S OPINION DOES NOT ALTER THE STATUTORY DEFINITION OF "PARTICIPANT," BUT DOES RECOGNIZE THAT THE PROOF REQUIRED TO MEET THE DEFINITION DIFFERS DEPENDING UPON THE NATURE OF THE ERISA CLAIM ASSERTED.

Judicial interpretation of ERISA standing has developed, not under § 510, but in the context of claims for breach of plan obligations—failure to provide plan documents,[2] denial of benefits,[3] or failure to meet fiduciary obligations.[4] Unlike § 510 claims, such claims arise from the contractual rights created by benefit plans and have their genesis in pre-ERISA jurisprudence: prior to ERISA, actions challenging denial of benefits and other

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[2] 29 U.S.C. §§ 1132(a)(1)(A) and (C); *see, e.g., Firestone Tire and Rubber Company v. Bruch*, 489 U.S. 101; *Winchester v. Pension Committee*, 942 F.2d 1190 (7th Cir. 1991); *Flick v. Borg-Warner Corp.*, 892 F.2d 285 (3d Cir. 1989); *Kuntz v. Reese*, 785 F.2d 1410 (9th Cir. 1986); *Saladino v. I.L.G.W.U. Nat'l Retirement Fund*, 754 F.2d 473 (2d Cir. 1985); *Nugent v. Jesuit High School of New Orleans*, 625 F.2d 1285 (5th Cir. 1980); *Buchanan v. Foster Elec. Co.*, 1989 WL 157340 (N.D. Ill. 1989); *Hager v. Veco Corp.*, 1 Employee Benefits Cas. (BNA) 1827 (N.D. Ill. 1979).

[3] 29 U.S.C. § 1132(a)(1)(B); *see, e.g., Firestone v. Bruch*; *Boren v. Southwestern Bell Telephone Co., Inc.*, 933 F.2d 891 (10th Cir. 1991); *Teagardner v. Republic-Franklin, Inc. Pension Plan*, 909 F.2d 947 (6th Cir. 1990); *Flick v. Borg-Warner Corp.*, 892 F.2d 285; *Yancy v. American Petrofina, Inc.*, 768 F.2d 707 (5th Cir. 1985); *Freeman v. Jacques Orthopaedic and Joint Implant Surgery*, 721 F.2d 654 (9th Cir. 1983); *Deller v. Portland General Elec. Co.*, 727 F. Supp. 1369 (D. Or. 1989).

[4] 29 U.S.C. §§ 1109, 1132(a)(2); *see, e.g., Flick v. Borg-Warner Corp., Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan*, 883 F.2d 345 (5th Cir. 1989); *Amalgamated Clothing & Textile Workers Union, AFL-CIO v. Murdock*, 861 F.2d 1406 (9th Cir. 1988); *Stanton v. Gulf Oil Corp.*, 792 F.2d 432 (4th Cir. 1986); *Kuntz v. Reese; Joseph v. New Orleans Elec. Pension & Retirement Plan*, 754 F.2d 628 (5th Cir. 1985); *Gilquist v. Becklin*, 675 F. Supp. 1168 (D. Minn. 1987).

pension plan rights were governed by principles of contract law. *Firestone*, 489 U.S. at 112.

The conduct prohibited by § 510 is not merely the failure to meet plan obligations; a § 510 claim requires interference with the employment relationship, with a specific intent to prevent attainment or to interfere with the exercise of a right under ERISA or an ERISA-governed plan. *Gavalik v. Continental Can Co.*, 812 F.2d 834, 851-52 (3rd Cir. 1987); *Zipf v. American Tel. & Tel. Co.*, 799 F.2d 889, 893 (3rd Cir. 1986). Thus, claims alleging violation of § 510 are more akin to common law actions in tort for wrongs to the employment relationship. *See, Woolsey v. Marion Laboratories, Inc.*, 934 F.2d 1452, 1461 (10th Cir. 1991) (recognizing that § 510 "was designed to protect the employment relationship which gives rise to an individual's pension rights."); *Vogel v. Independence Federal Savings Bank*, 692 F.Supp. 587, 595 (D.Md. 1988) (§ 510 creates the statutory equivalent of tortious interference claim); *see also, Vogel*, 728 F. Supp. 1210, 1218 n.18 (D. Md. 1990).

Section 510 was enacted to prevent interference with the attainment or exercise of *any* right or benefit to which a participant may become entitled, including the opportunity to accrue additional benefits through continued employment. *See, e.g., Conkwright v. Westinghouse Elec. Corp.*, 933 F.2d 231, 236 (4th Cir. 1991). And since the prohibitions of § 510 are not limited to conduct that result in deprivation of benefits, but reaches as well conduct that harms the employment relationship, a § 510 plaintiff need not present a claim for benefits at all. *Zipf*, 799 F.2d at 893; *see also, McClendon*, 111 S.Ct. at 486.[5]

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[5] Mobil cites *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985) for the proposition that only "benefits" are recoverable on a claim under ERISA. Petition at 16. *Russell* held that under § 1132(a)(2), an individual may bring a § 1109 suit for breach of fiduciary duty to recover on behalf of the plan, but not for losses he

It is therefore not surprising that a wrongfully discharged employee may prove that he has a "colorable claim for vested benefits" and thus standing by a showing that is different from the showing required a plaintiff suing for the denial of benefits or for plan information. The § 510 plaintiff may be considered a "current employee," as a matter of law, or his standing as a "participant" may be determined as of the time the tort was committed. He may prove that he should never have lost his job, and upon such proof, establish a claim for vested benefits he has earned in law though not in fact.

This does not mean that the statutory definition of "participant" is different in a § 510 case, but it does mean that the proof required to meet the definition may indeed be different in a § 510 context than in a benefits denial context.

The same result obtains under the other prong of the *Firestone* formulation, i.e., whether the "former" employee has a "reasonable expectation of returning to covered employment." The fact that a § 510 plaintiff does not precede his suit by asking his employer to rehire him cannot defeat his standing to bring an ERISA § 510 claim.[6] Reinstatement, whether through an informal, pre-suit request for reemployment or otherwise, is not a pre-

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has personally incurred. The majority opinion in *Russell* states that the Court was not considering whether any other ERISA provision —such as § 510—authorized recovery of extracontractual relief. *Vogel*, 692 F. Supp. at 595, citing *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. at 139, n.5, 105 S.Ct. at 3088 n.5; *see also, Vogel*, 728 F. Supp. at 1218.

[6] Here, as the Fifth Circuit noted, respondents *did* request reinstatement in connection with their age discrimination claim, indicating that respondents "do desire court-ordered reinstatement." [21a.] On remand, they have also requested reinstatment on their ERISA § 510 claims—which defeats Mobil's argument against standing in this case in any event. *See, Mitchell*, 896 F.2d at 474; Christopher, 950 F.2d at 1223.

requisite to a cause of action under § 510.[7] And the remedies provided by § 510 were designed to be administered by the courts, not by the employer or the plan administrator. *Zipf v. American T & T*, 799 F.2d at 892, citing 2 Legislative History of the Employee Retirement Income Security Act of 1974, 1641-42 (1976).[8]

Indeed, given the nature of the conduct actionable under § 510, a pre-suit request to be rehired is likely an exercise in futility. Where employment has terminated because of conduct in violation of § 510, reinstatement may be a practical impossibility due to the former employee's age, illness or injury (whether related to the prohibited conduct or not), hostility, or dissolution of the employer's business. If the employee asks the employer for reinstatement, and the employer rejects the request, saying there is "no chance" of reinstatement, then can the employee ever prove a "reasonable expectation of returning to covered employment?"

The Fifth Circuit's opinion in this case recognizes, in effect, that "equitable" or constructive reinstatement is the only realistic alternative in such cases. Section 510

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[7] *See, e.g., Berger v. Edgewater Steel Co.*, 911 F.2d 911, 922 (3rd Cir. 1990), *cert. denied*, 111 S. Ct. 1310 (1991); *Saporito v. Combustion Engineering, Inc.*, 843 F.2d 666, 672 (3rd Cir. 1988), *vacated and remanded*, 489 U.S. 1049, *on remand*, No. 87-5144, slip op. (3rd Cir. June 29, 1989); *Fischer v. Philadelphia Electric Co.*, 1991 WL 36215, at p. 5; *Conkwright*, 739 F. Supp. 1006, *aff'd*, 933 F.2d 231 (4th Cir. 1991); *Nemeth v. Clark Equipment Co.*, 677 F. Supp. 899, 908 (W.D. Mich. 1987); *Garry v. TRW, Inc.*, 603 F. Supp. 157, 164 (N.D. Ohio 1985); *Folz v. Marriott Corp.*, 594 F. Supp. 1007, 1016 (W.D. Mo. 1984); *Bittner v. Sadoff & Rudoy*, 490 F. Supp. 534, 536 (E.D. Wis. 1980); *Calhoun v. Falstaff Brewing Corp.*, 478 F. Supp. 357, 360 (E.D. Mo. 1979).

[8] In *Zipf*, the Third Circuit held that the plaintiff was not required to submit her § 510 claim (which included a request for reinstatement, back pay and other restitutionary relief) to the plan for administrative determination. In so holding, the court drew a distinction between a claim under § 510 and contractual claims for benefits or other contract-based rights under other provisions of ERISA. 799 F.2d at 892.

contemplates that federal courts will fashion equitable, "make whole" remedies—in effect treating the wrongfully discharged employee as though he had never been terminated. *See*, *Folz v. Marriott*, 594 F.Supp. at 1015; *Bittner v. Sadoff & Rudoy Industries*, 490 F.Supp. at 536 (under the equitable power afforded the courts by ERISA, the court is not limited in its ability to award relief to mere restoration of pension plan benefits, but has equitable power to put plaintiff "back into the position he enjoyed before the discharge."); *accord*, *Fleming v. Ayers & Associates*, 948 F.2d 993, 998 (6th Cir. 1991), citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-19.

This Court's decision in *McClendon* reaffirms the availability of the full panoply of equitable remedies to redress § 510 violations. Although *McClendon* did not address the question of standing, this Court held that where a former employee has been discharged in order to defeat pension rights and he seeks—not benefits—but lost wages and other compensatory relief, his remedy is not under state law but under ERISA § 510:

> There is no basis in § 502(a)'s language for limiting ERISA actions to only those which seek "pension benefits." It is clear that the relief requested here [including loss wages and other "extracontractual" relief] is well within the power of the federal courts to provide.

111 S.Ct. at 486.[9]

McClendon requested neither an award of unpaid, vested benefits nor reinstatement of his employment. He

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[9] The Fifth Circuit did not hold or even imply that *McClendon* overruled or "superseded sub silentio" *Firestone*. The Fifth Circuit merely reasoned that Mr. McClendon would have standing to sue under the ERISA claim this Court said he possessed—under § 510. That conclusion merely buttressed the circuit court's construction of *Firestone* in the context of a § 510 claim. The Fifth Circuit's opinion is consistent with both *McClendon* and *Firestone*, and these two opinions are consistent with each other.

had neither a colorable claim for vested benefits nor a reasonable expectation of returning to covered employment, but he nonetheless had suffered an injury for which § 510 provided a remedy.

McClendon, like the plaintiffs here, could establish his standing if he proved his § 510 claim. Either his standing was to be determined at the time the tort (i.e., the § 510 violation) occurred, or, upon proof of the violation, he could demonstrate his status in law as a "current employee." And even as a former employee in fact, upon proof of the violation, he could establish a claim for unpaid benefits and far more than a mere "expectation of returning to covered employment." [10]

In sum however the Fifth Circuit's standing decision is analyzed, it is consistent with the definition of "participant" under ERISA § 3(7), and it is not inconsistent with *Firestone* or, as demonstrated in the next section, any of *Firestone's* progeny in the other circuits.

V. THE FIFTH CIRCUIT'S DECISION IS NOT INCONSISTENT WITH PRECEDENT IN OTHER CIRCUITS.

The Fifth Circuit's analysis of standing in this case is not inconsistent with *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463 (10th Cir.), *cert. denied*, 111 S.Ct. 252 (1990), or with the decisions of other circuits on ERISA standing. The requirement that plaintiffs here prove they were involuntarily discharged as a result of fraudulent misrepresentations distinguish the cases Mobil cites. As the Fifth Circuit observed:

> . . . [Plaintiffs'] allegations do at least suggest an assertion that they were constructively discharged in violation of section 510 and that but for Mobil's non-

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[10] *See, e.g., Folz v. Marriott*, 594 F. Supp. at 1016; *Saporito v. Combustion Engineering, Inc.*, 843 F.2d at 672; *Bittner v. Sadoff & Rudoy Industries*, 490 F. Supp. at 536.

> disclosure they would be covered employees with standing to challenge the plan amendment. They allege deceptive conduct by Mobil that might be found to vitiate the voluntariness of their decision to retire and that might distinguish the present case from both *Yancy* and *Mitchell*.

Christopher, 950 F.2d at 1223. As the court adduced, it is the involuntariness of plaintiffs' termination that may and, with proof, will distinguish this case from those which Mobil claims are inconsistent with the Fifth Circuit's opinion. *See and compare, Yancy v. American Petrofina, Inc.*, 768 F.2d 707, 709 (5th Cir. 1985). The *Mitchell* and *Yancy* plaintiffs exercised a knowing and legally voluntary (albeit unwanted) choice to retire and accept a lump-sum payment of their vested benefits in lieu of continuing employment and later challenging their employer's conduct. *See especially*, 950 F.2d at 1227. That defeated their standing. Here, the plaintiffs made no such knowing choice. They were defrauded out of their jobs—the legal equivalent of an outright firing. But that is what they must *prove* in order to have standing.

Similarly, in *Stanton v. Gulf Oil Corp.*, 792 F.2d 432 (4th Cir. 1986) and in *Freeman v. Jacques Orthopaedic & Joint Implant Surgery Medical Group, Inc.*, 724 F.2d 654 (9th Cir. 1983)—both pre-*Firestone* cases—the issue was whether an employee who had never been a "participant" in the ERISA plan from which he was claiming benefits could be treated as one if he *claimed* that he would have become a "participant" but for the employer's alleged fraud. Aside from the fact that neither case is a § 510 discharge case, both make the very point articulated in *Firestone* and followed by the Fifth Circuit in this case: a person either is or is not a "participant." A mere allegation or claim that he would have had such status but for his employer's actions (or any other circumstance for that matter) does not establish standing. Proof of the actual status is required. *See also* and *com-*

pare, Winchester v. Pension Committee, 942 F.2d 1190, 1193 (7th Cir. 1991) (mere assertion of claim to reinstatement is not sufficient to establish a "reasonable expectation of returning to covered employment" and thus standing); *Teagardener v. Republic-Franklin Incorporated Pension Plan*, 909 F.2d 947, 949-50 (6th Cir. 1990) (former employees not entitled to additional benefits accruing from termination of retirement plan after they voluntarily retired and ceased to be "participants").

None of the cases cited by Mobil are inconsistent with the Fifth Circuit's decision in this case.

VI. THE CIRCUIT COURTS HAVE ONLY RECENTLY BEGUN TO ADDRESS THE ISSUE PRESENTED HERE.

As the Fifth Circuit's decision reveals, the circuits have only begun to articulate the principles of standing applied below. In *Berger v. Edgewater Steel Co.*, 911 F.2d 911, 922 (3rd Cir. 1990), *cert. denied*, 111 S. Ct. 1310 (1991), the Court followed prior law in holding that the former employees did not have standing to sue for the denial of additional benefits where they had retired and accepted all their earned benefits in a lump sum and had not asked for reinstatement. But on the § 510 claim, the court held:

> Of course, we recognize that if the employees were constructively discharged as they do claim, they would not necessarily have to return to work in order to have standing to claim a make whole remedy.

The Third Circuit has voiced similar concepts in *Saporito v. Combustion Engineering, Inc.*, No. 87-5144, slip op. at 5 (3rd Cir. June 29, 1989), *on remand*, 489 U.S. 1049 (1989), after remand from this Court to reconsider standing in light of *Firestone*. On remand, the court reaffirmed an even broader principle than that applied by the Fifth Circuit in this case:

> By its very nature a § 510 claim will often involve employees who claim that they did not receive benefits

> because of the employer's actions, and thus were denied an opportunity to become participants in the benefits. To require that the employees have the status of participants where they allege that the employers' acts effectively deprived them of such status would undercut the provision [i.e., § 510] and cannot have been intended by Congress.

Other courts have reached the same result, but without necessarily articulating the means of establishing standing in the same terms used as the Fifth and Third Circuits. *See, e.g., Jones v. AT & T Co.*, 1992 WL 68266, at 5 (E.D. Pa. 1992); *Fischer v. Philadelphia Elec. Co.*, 1991 WL 36215 (E.D. Pa. 1991); *Young v. AT & T Transition Protecton Payment Plan*, 1989 WL 675, at 1 (D.N.J. 1989) (former employee may maintain § 510 action where employer made false representations inducing employee's involuntary resignation and thereby depriving him of early retirement benefits available in plan which was announced the day after his separation from employment); *Deller v. Portland General Elec. Co.*, 727 F.Supp. 1369, 1371 (D. Or. 1989) (plaintiffs who received lump sum payment of vested retirement benefits upon termination may state claim under § 510 by showing that but for employer's discriminatory conduct in calculating termination dates they would have been employed and eligible on date improved retirement benefits were made available).

As mentioned earlier, the issue presented here has recently been certified for interlocutory appeal under 28 U.S.C. § 1292(b)—at Mobil's request—in the related case of *Raymond v. Mobil Oil Corp.*, Civil Action No. 88-Z-2112, pending in the U.S. District Court for the District of Colorado. In *Raymond*, a certified class action of "window" retirees, the District Court ruled that the Fifth Circuit's decision in this case is not inconsistent with *Mitchell*. If the Tenth Circuit grants Mobil's petition for immediate review, it will then rule on the issue. If the Tenth Circuit were to reverse the District Court's ruling, then a conflict would exist between the circuits.

In the meantime, the ERISA § 510 claims in this case are now before the District Court and should be resolved on their merits in due course. If plaintiffs establish their standing to the District Court's satisfaction, the issue in this case may return to the appellate courts—by which time the Tenth Circuit and perhaps other circuits will have also decided the issue. The lower courts should be permitted to more fully develop the law on this issue before this Court exercises its discretionary review jurisdiction. *See also, Deeming v. American Standard, Inc.*, 905 F.2d 1124, 1127 (7th Cir. 1990); *Healy v. Axelrod Const. Co. Pension Plan & Trust*, 787 F. Supp. 838, 844-45 (N.D. Ill. 1992) (noting that the "exact perimeters of [Section 510] have not been fully developed judicially.").

VII. THE FIFTH CIRCUIT'S OPINION DOES NOT CREATE "UNCERTAINTY" OR "INCONSISTENCY" IN THE ADMINISTRATION OF ERISA PLANS.

Mobil contends that the Fifth Circuit's standing analysis will impair the "delicate balance" between the protection of employee benefits and the costs of administering benefit plans. Mobil's argument emphasizes only one purpose of ERISA—to protect benefits—to the exclusion of the purpose for which § 510 was enacted: protection of the employment relationship that gives rise to the benefits. *West v. Butler*, 621 F.2d 240, 245 (6th Cir. 1980); *Gavalik v. Continental Can Co.*, 812 F.2d 834, 851 (3rd Cir. 1987); *Garry v. TRW, Inc.*, 603 F.Supp. 157, 162 (N.D. Ohio 1985); *Donahue v. Custom Management Corp.*, 634 F.Supp. 1190, 1197 (W.D. Pa. 1986).

Congress viewed § 510 as a crucial part of ERISA because without it employers would be able to "circumvent the provision of promised benefits." *Ingersoll-Rand Co. v. McClendon*, 111 S.Ct. at 485 (1990). Section 510 was enacted "to prevent unscrupulous employers from discharging or harassing their employees in order to prevent them from obtaining their statutory or plan-based

rights." *Zipf v. AT&T*, 799 F.2d at 891, citing *West v. Butler*, 621 F.2d at 244-46.

Mobil attempts to create a gap between preemption and standing that was not intended by Congress. By its holding in *McClendon*, this Court reaffirmed that ERISA is intended to provide a federal remedy for what previously could only be litigated as a wrongful discharge claim under state law. But this does not imply that employers are now free to engage in fraud and concealment to procure the "retirement" of their employees with the intent to deprive them of benefits or other rights under a plan. Under Mobil's analysis, as long as employers can dupe employees into accepting payment of their *currently* accrued benefits, immunity from § 510 claims would be guaranteed. And terminated employees, because of preemption, would be left without state-law claims to redress the employer's misconduct.

Mobil would eviscerate the protections provided by § 510 in the name of administrative expense, legal predictability, and certainty of plan obligations. But the Fifth Circuit's decision does not increase the legal or administrative burdens on ERISA plans or employers. The legal obligation of the plan and the employer to employees under § 510 is to refrain from the conduct prohibited by § 510.

By definition, the means of proving "participant" status recognized by the Fifth Circuit applies only to § 510 claims, and only to a limited, fact-specific subclass of § 510 cases—where the employer has taken prohibited action against the employee *and* the prohibited conduct has itself divested the employee of his status as a current employee. The opinion does not confer standing on every former employee who has "second thoughts" about his early retirement.

The Plan's obligations to former employees remain unchanged. Former employees asserting claims for denial of benefits, for enforcement of plan obligations, or for

refusal of plan information must continue to meet the "colorable claim" or "reasonable expectation" tests established by Firestone. Section 510 claimants must also meet those tests, but they may do so by proof that the alleged § 510 violation did occur and that the violation is the reason they are no longer current employees in fact.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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July 27, 1992

APPENDIX

APPENDIX

Opinion of the United States Court of Appeals for the Fifth Circuit, January 24, 1992

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 90-4562

Jan. 24, 1992

GERALD W. CHRISTOPHER, CHARLES L. PRUNTY, and BILLY G. TURNER,
Plaintiffs-Appellants,

—v.—

MOBIL OIL CORPORATION, RETIREMENT PLAN OF MOBIL OIL CORPORATION and REX ADAMS,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Texas

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Before:

HENLEY,* KING, and GARWOOD,
Circuit Judges.

GARWOOD, *Circuit Judge*:

Appellants brought claims under the Age Discrimination in Employment Act (ADEA) and the Employee Re-

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* Circuit Judge of the Eighth Circuit, sitting by designation.

tirement Income Security Act (ERISA), as well as various common-law claims including fraud, civil conspiracy, and breach of the employment contract, against their former employer Mobil Oil Corporation, based on Mobil's 1984 amendment of its employee benefit plan and alleged failure to disclose to appellants all of the options available under the amended plan. The district court granted Mobil's motion for summary judgment on the ADEA claims on the grounds that the claims were time-barred and that as a matter of law appellants were not constructively discharged in violation of ADEA. The district court also granted Mobil's request for judgment on the pleadings on appellants' state law claims on the ground that they were preempted by ERISA, and dismissed the ERISA claims on the ground that because appellants were not participants seeking to recover benefits from a retirement plan, the court lacked jurisdiction over their ERISA claims. We affirm in part and reverse and remand in part.

Facts and Proceedings Below

The following facts are drawn from the parties' submissions of undisputed facts in connection with Mobil's motions for summary judgment, judgment on the pleadings, and dismissal.

Mobil provides retirement benefits for its employees through a defined benefit plan, under which employees receive a pension based on years of service, salary history, and life expectancy. Until 1977, the standard method of receiving these pensions was in the form of an annuity. In that year, however, Mobile [sic] added a lump sum option, enabling certain employees to receive the actuarial equivalent of their annuity, discounted at five percent, in one payment following retirement. To be eligible for the lump sum option, an employee had to have either an accrued lump sum pension benefit, or a net worth independent of the pension, equal to at least

$250,000. Also, the employee was required to be at least fifty-five years old.

On July 2, 1984, Mobil announced changes to the lump sum option of the retirement plan, including (1) an increase in the discount rate from 5% to 9.5%, to operate prospectively, *i.e.*, to be applied to all earnings after January 31, 1985; (2) an increase in the eligibility threshold from $250,000 to $450,000; and (3) a linking of the new threshold to the Consumer Price Index. These changes, which were announced as subject to Internal Revenue Service (IRS) approval, would apply to all employees retiring after January 31, 1985; thus, employees otherwise eligible to retire had a six-month window in which they could retire subject to the lower threshold and lower discount rate. The choice was a significant one for employees who met the $250,000 threshold but who were uncertain ever to meet the indexed $450,000 threshold because, with market interest rates well above 5%, the lump sum pensions were worth 40% more than the annuities. Appellants, Gerald Christopher, Charles Prunty, and Billy Turner, were among the approximately 1,100 Mobil employees who elected to take early retirement during the 6-month window. All three submitted their retirement notices between August and October 1984, and retired as of January 1, 1985.

On July 16, 1984, Mobil sought a determination from the IRS that the plan as amended continued to meet the Internal Revenue Code's requirements for favorable tax treatment, including the requirement that pension plans not "discriminate in favor of highly compensated employees." 26 U.S.C. § 401(a)(4). In meetings in late September 1984, the IRS reviewing agent expressed concern that the amended plan could result in benefits favoring highly compensated employees, and indicated that he might need to seek technical advice from Washington. In response, Mobil adopted another plan amendment allowing Mobil, in its sole discretion, to waive the eligibility

threshold in individual cases for valid cause shown. After insertion of this provision, the IRS issued to Mobil a favorable determination letter on November 23, 1984, noting that continued qualification of the plan would depend upon its effect in operation.

Mobil announced the IRS approval to its employees on December 21, 1984, but did not notify its employees of the waiver provision until well after expiration of the six-month window—October 1985. Because of a 1985 IRS revenue ruling and subsequent pronouncements, Mobil eventually entirely deleted the lump sum eligibility threshold in 1986.

Appellants filed age discrimination charges against Mobil with the Equal Employment Opportunity Commission (EEOC) on March 1, 1989. They alleged that Mobil's conduct in amending the plan and concealing the waiver provision was a concerted scheme to reduce its work force. By purporting to increase the lump sum threshold and concealing its awareness that applicable tax law precluded that action, appellants charged, Mobil induced hundreds of older employees into retirement without the need to pay them an early retirement bonus. The EEOC dismissed the charges as untimely filed. Appellants then commenced this suit on July 7, 1989. They alleged that Mobil's conduct constituted age discrimination in violation of ADEA, 29 U.S.C. §§ 621 *et seq.*, as well as common-law fraud, civil conspiracy, unlawful interference with contract rights, breach of the employment contract, negligence, and gross negligence. In the event that appellants' state law claims were held to be preempted by ERISA, the complaint alleged in brief and conclusory fashion that Mobil's conduct violated ERISA, apparently ERISA § 510, 29 U.S.C. § 1140, prohibiting interference with an employee's attainment of a right under ERISA. For all claims, appellants sought the wages and employment benefits they would have received had they continued working until normal retirement age.

On the ADEA claims, appellants also requested reinstatement.

Mobil moved for summary judgment on the ADEA and state law claims. The district court granted the motion, finding that the ADEA and state law claims were time-barred, that appellants had not been constructively discharged in violation of the ADEA, and that appellants' claims of discrimination arose from changes in fringe benefits available under a bona fide retirement plan, not from discrimination in nonfringe aspects of employment, and thus were not within the purview of the ADEA according to ADEA § 4(f)(2), 29 U.S.C. § 623(f)(2). Simultaneously, Mobil moved for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) on the state law claims on the ground that they were preempted by ERISA, and dismissal under Federal Rules of Civil Procedure 12(b)(1) & (6) of the contingent ERISA claim on the ground that appellants were not "participants" seeking to recover benefits under ERISA § 502, 29 U.S.C. § 1132, depriving the court of jurisdiction. The district court granted this motion as well.

Discussion

I. ADEA Claims

We first examine the district court's grant of summary judgment on the ADEA claims on the ground that they were time-barred. In reviewing a grant of summary judgment, all legitimate factual inferences presented by the record are drawn in favor of the party opposing the motion. *Bozé v. Branstetter*, 912 F.2d 801, 804 (5th Cir. 1990) (per curiam). We can uphold the summary judgment only if our review demonstrates that no genuine issue of material fact remains and that the moving party is entitled to judgment as a matter of law. *Id.*

It is not disputed that the applicable statutes of limitations require an employee to file an age discrimination

charge with the EEOC within 300 days after the alleged unlawful practice occurred, 29 U.S.C. § 626(d)(2), and to file a lawsuit within 3 years after the alleged unlawful practice occurred, 29 U.S.C. §§ 255(a), 626(e). Appellants argue, however, that a genuine issue of material fact exists as to when their awareness of the facts constituting the alleged age discrimination was sufficient to commence the running of the limitations period. *See Pruet Production Co. v. Ayles*, 784 F.2d 1275, 1279 (5th Cir. 1986) ("[T]he statute does not begin to run until the facts which would support a cause of action are apparent or should be apparent to a person with reasonably prudent regard for his rights." (quoting *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924, 930 (5th Cir. 1975))). Specifically, they argue that Mobil's negotiation of a revised plan in October 1984 only came to light in 1988 when counsel for another former employee, Porter Mitchell (Mitchell), suing Mobil in federal district court in Colorado, discovered the correspondence between Mobil and the IRS. It was only when this fact became publicly known at the trial of *Mitchell v. Mobil Oil Corp.* in December 1988,[1] appellants argue, that they had any reason to know of Mobil's concealment of the

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[1] The alleged fraud was not part of Mitchell's claims against Mobil. He argued, rather, that the plan amendment itself constituted a constructive discharge and was a willful violation of the ADEA. He also argued that Mobil had breached its fiduciary duties under ERISA § 404, 29 U.S.C. § 1104, and had violated ERISA's anti-cutback provision, ERISA 204(g), 29 U.S.C. § 1054(g), by retroactively limiting his right to the lump sum option, an accrued benefit. The jury found in favor of Mitchell on his ADEA claim and awarded him damages for back pay, front pay, and lost benefits. The district court held in favor of Mitchell on the ERISA claims as well, awarding him compensatory and liquidated damages. On appeal, the Tenth Circuit reversed, holding that Mitchell had failed to prove that Mobil's proffered justification for the plan amendment was a mere pretext for discrimination, and that Mitchell was not a participant with standing to assert ERISA claims. *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463, 471-74 (10th Cir.), *cert. denied*, —— U.S. ——, 111 S.Ct. 252, 112 L.Ed.2d 210 (1990).

waiver option. Appellants' EEOC filing in March 1989 and their commencement of this suit in July 1989 would both have been timely if the statute of limitations had commenced running in December 1988.

Evaluating the appellants' claim that the statute of limitations did not commence until December 1988 requires an analysis of the nature of their ADEA claim. The ADEA forbids an employer to "discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). A "discharge" within the meaning of this section may be constructive if a reasonable person in the employee's position would have felt compelled to resign under the circumstances. *Bodnar v. Synpol, Inc.*, 843 F.2d 190, 192 (5th Cir.), *cert. denied*, 488 U.S. 908, 109 S.Ct. 260, 102 L.Ed.2d 248 (1988). An attractive early retirement offer, however, is not a constructive discharge merely because it creates a strong incentive to retire; an early retirement option can constitute a constructive discharge only if the employee shows that it sufficiently alters the status quo that each choice facing the employee makes him worse off. *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463, 467 (10th Cir.), *cert. denied*, —— U.S. ——, 111 S.Ct. 252, 112 L.Ed.2d 210 (1990); *Bodnar*, 843 F.2d at 193.

The gist of appellants' *prima facie* ADEA claim is as follows. The adoption of the 1984 plan amendment presented appellants with a choice between unfavorable options; they faced the choice of retiring within the six-month window or staying on at Mobil but possibly forgoing eligibility for the lump sum payout. Either could be regarded as less favorable than staying on at Mobil until normal retirement age with the assurance of eligibility for the lump sum payout, which was the "status quo" when the amendment was adopted. The asserted discriminatory character of the amendment to the plan

arises from the fact that only employees over the age of fifty-five were put to that choice. Employees under fifty-five did not presently qualify for retirement, so although the plan amendment may have defeated an expectation for them, they were not confronted with the possibility of losing a benefit for which they were then qualified. *See Mitchell*, 896 F.2d at 496.

This much of the ADEA theory was evident in July 1984 upon the initial announcement of the plan. The unfavorable choice to which it put "window" employees and its particular impact on employees over fifty-five were both apparent on the face of the plan amendment. Indeed, the theory outlined above was precisely Mitchell's claim against Mobil, accepted by the Tenth Circuit. Mitchell filed a complaint with the EEOC on April 25, 1985, with no knowledge of Mobil's alleged concealment of the waiver provision. Moreover, another employee, Frederic J. Raymond (Raymond), filed a similar charge with the Ohio Civil Rights Commission and the EEOC on May 10, 1985. Therefore, unless appellants can show that Mobil's alleged concealment adds a material element to their ADEA claim, the statute of limitations should have commenced running in July 1984.

Appellants have offered no theory under which the alleged nondisclosure is a necessary element. They refer us to the Fourth Circuit case of *Stone v. University of Maryland Medical System Corp.*, 855 F.2d 167 (4th Cir. 1988), for their argument that "where, as here, the employee surrenders his job as a proximate result of fraud and deceit by the employer, the voluntariness of the retirement or resignation is fundamentally vitiated." *Stone* is one of a series of cases where resignations have been held to be involuntary based on an employer's misrepresentations about or nondisclosure of an employee's rights. Others include *Covington v. Department of Health and Human Services*, 750 F.2d 937 (Fed. Cir.1984), and *Scharf v. Department of the Air Force*, 710 F.2d 1572 (Fed.Cir.1983).

We do not believe that these cases avail appellants, however. As appellants' phrasing of their argument reflects, the effect of a showing of fraud in these cases is to render an otherwise voluntary choice involuntary. *Stone* and related cases involve disputes in which public employees were entitled to certain procedural protections if they were to be terminated involuntarily; they were required to show that their retirement was involuntary to invoke the jurisdiction of the Merit Systems Protection Board or to establish a "deprivation" under the due process clause. Here, by contrast, appellants allege a constructive discharge arising from the choice to which they were put by the plan amendment. To further argue that the actual election made was involuntary because it was based on incomplete information would be superfluous; involuntariness is implicit in appellants' argument that they were coerced into early retirement by the threatened removal of the lump sum option. Assuming, *arguendo* only, that appellants' allegations of nondisclosure would serve to estop Mobil from raising in defense the claim that appellants' retirement was voluntary, nevertheless the asserted nondisclosure does not form a material part of appellants' constructive discharge theory that would prevent the statute of limitations from commencing.

Appellants' arguments that this Court should apply equitable tolling or equitable estoppel fail for similar reasons. These doctrines provide for tolling of the statute of limitations when a plaintiff's unawareness of his ability to bring a claim—either unawareness of the facts necessary to support a discrimination charge or unawareness of his legal rights—is due to defendant's misconduct. *See Rhodes v. Guiberson Oil Tools Division*, 927 F.2d 876, 878-79 (5th Cir.), *cert. denied*, —— U.S. ——, 112 S.Ct. 198, 116 L.Ed.2d 158 (1991); *Kale v. Combined Insurance Co.*, 861 F.2d 746, 752 (1st Cir. 1988). Here, the knowledge allegedly concealed from the employees was that they had a third option—to continue their

employment and apply for a waiver from the higher lump sum requirement. Therefore, the facts as known to the employees in 1984 actually gave them a *better* ADEA claim than they would have had with full knowledge. Whatever nondisclosures Mobil is guilty of would not have lulled appellants into postponing assertion of their rights; if anything, it would have made them *more* likely to assert that they were constructively discharged.

Finally, appellants argue that although they knew in 1984 of the plan amendment and retirement window, they were misled into believing that they had no cause of action by Mobil's plausible justifications for its amendment of the plan, *i.e.*, that the threshold was changed to adjust for intervening inflation and that the discount rate was raised to align Mobil's practice with that of its competitors and to more realistically reflect current interest rates. In other words, appellants contend that although the discriminatory *effect* of the amendment was apparent in 1984, it was only upon learning of the concealment of the waiver option that they had reason to believe the plan amendment was actuated by age bias and that the alleged concerted scheme to reduce the work force began to take shape.

We find this argument unpersuasive as well. First, we fail to see how the deception alleged by appellants calls into question Mobil's proffered justifications for the plan amendment. The evidence does not create a genuine dispute as to the factual accuracy of Mobil's proffered justifications. Even if appellants' allegations are true respecting Mobil's having deceived its employees about the validity under applicable tax law of the plan amendment and about the waiver provision, there is no evidence showing that Mobil's announced reasons for the plan amendment were deceptive. This is an issue on which appellants would have had the burden at trial, and they were hence required to meet Mobil's summary judgment motion with summary judgment evidence that would sus-

tain a jury finding in their favor on the issue. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Blumberg v. HCA Management Co., Inc.*, 848 F.2d 642, 644 (5th Cir.1988), *cert. denied*, 488 U.S. 1007, 109 S.Ct. 789, 102 L.Ed.2d 781 (1989).

In any event, a showing of deception as to motive supports equitable estoppel only if it conceals the very fact of discrimination; equitable estoppel is not warranted where an employee is aware of all of the facts constituting discriminatory treatment but lacks direct knowledge of the employer's subjective discriminatory purpose. Thus, where an employee was told that he was being discharged because industry economic downturn required reduction of the work force, and was told that he would be considered for re-hiring, we applied equitable estoppel to hold that limitations on his ADEA claim did not commence until he learned that he had been replaced by a younger employee. *Rhodes*, 927 F.2d at 880-82; *see also Coke v. General Adjustment Bureau, Inc.*, 640 F.2d 584, 595 (5th Cir.1981) (en banc) (employer's misrepresentation that employee would be reinstated induced foreseeable forebearance in filing ADEA claim); *Meyer v. Riegel Products Corp.*, 720 F.2d 303, 307 (3d Cir.1983) (employer's explanation to employee that he was dismissed as part of a reorganization furnished grounds for equitable tolling in an ADEA suit until discharged employee learned that a younger replacement had been hired), *cert. dismissed*, 465 U.S. 1091, 104 S.Ct. 2144, 79 L.Ed.2d 910 (1984). By contrast, where an employee knew that he was discharged and replaced by a younger employee, his allegation that the company concealed from him the true reason for his discharge and that it was not until subsequent hirings that the "pattern of age discrimination" became evidence was held insufficient to support equitable estoppel. *Pruet Production Co.*, 784 F.2d at 1279-80; *accord Chapman v. Homco, Inc.*, 886 F.2d 756, 758 (5th Cir.1989), *cert. denied*, 494 U.S. 1067, 110 S.Ct. 1784,

108 L.Ed.2d 785 (1990); *Blumberg*, 848 F.2d at 645.[2] The showing required for a *prima facie* employment discrimination claim is minimal, *see Pruet Production Co.*, 784 F.2d at 1279, and when "facts that would support a cause of action are or should be apparent," the statute commences even if the employee is not aware of *all* the evidence that he will ultimately rely upon at trial. *Blumberg*, 848 F.2d at 645 (emphasis added). The showing required at the stage of filing charges with the EEOC is even more lenient, because the purpose of the filing is only to initiate an EEOC investigation. *Pruet Production Co.*, 784 F.2d at 1279.

Applying those principles here, we conclude that whatever concealment Mobil may have been guilty of did not deceive appellants as to the facts of the alleged discrimination. Rather, appellants were able to evaluate the propriety of their alleged constructive discharge for ADEA purposes immediately. Just as in individual discharge cases the *prima facie* showing is only that the employee has been discharged and replaced by a younger worker, leaving exploration of an employer's motives for the EEOC investigation or pretrial discovery, here the appellants' *prima facie* case for constructive discharge was that older employees alone were put to the unfavorable choice of early retirement or loss of the lump sum option. This fact, apparent in July 1984, was sufficient to put appellants on notice of possible age discrimination (as it did other Mobil employees) and to require them to assert their rights.

For these reasons, even accepting for purposes of our review of the summary judgment appellants' charges of nondisclosure, we do not believe that a genuine issue of

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[2] This view is consistent with this Circuit's rule in Title VII cases that the limitations period starts running when the plaintiff knows of the discriminatory *act*, not when the plaintiff perceives a discriminatory motive behind the act. *See Merrill v. Southern Methodist University*, 806 F.2d 600, 605 (5th Cir.1986).

material fact exists as to when the statute of limitations on the ADEA claims commenced. Concluding that the district court's grant of summary judgment is supported on that ground, we do not reach the district court's further holding that as a matter of law appellants were not constructively discharged in violation of the ADEA.

II. ERISA Preemption of State Law Claims

We next address the district court's grant of judgment on the pleadings on appellants' state law claims. Appellants charged that Mobil's actions in amending the plan and withholding information about the waiver provision fraudulently induced them to surrender their jobs, were taken pursuant to a plan to reduce Mobil's work force, and breached the duty of good faith and fair dealing owed to appellants by Mobil under their employment contracts. This conduct, appellants alleged, gave rise to claims for fraud, civil conspiracy, breach of the employment contract, unlawful interference with contract rights, negligence, and gross negligence. The district court held these claims were preempted because they "relate to Mobil's Retirement Plan, which is governed by ERISA, and directly overlap with provisions of ERISA." We turn to the first ground relied upon by the district court, namely that appellants' claims "relate to" an ERISA-governed retirement plan.

ERISA's provisions "supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." ERISA § 514(a), 29 U.S.C. § 1144(a). The Supreme Court has consistently emphasized the expansiveness of the "relate to" standard and its purpose of establishing the regulation of pension plans as an exclusively federal concern. *See, e.g., Ingersoll-Rand Co. v. McClendon*, —— U.S. ——, 111 S.Ct. 478, 482, 112 L.Ed. 2d 474 (1990); *FMC Corp. v. Holliday*, —— U.S. ——, 111 S.Ct. 403, 407, 112 L.Ed.2d 356 (1990); *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549,

1552-53, 95 L.Ed.2d 39 (1987); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S.Ct. 2890, 2899-2901, 77 L.Ed.2d 490 (1983). The words "relate to" are to be given their "broad common-sense meaning," *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 105 S.Ct. 2380, 2389, 85 L.Ed.2d 728 (1985), and a state law will be pre-empted "if it has a connection with or reference to such a plan." *Shaw*, 103 S.Ct. at 2900. This Circuit has held that the fact that a claim sought damages measured by pension benefits sufficed as the requisite "connection" to an employee benefit plan for preemption purposes. *Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290, 1294 (5th Cir. 1989). *But see Memorial Hospital System v. Northbrook Life Insurance Co.*, 904 F.2d 236, 247 (5th Cir. 1990); *Pizlo v. Bethlehem Steel Corp.*, 884 F.2d 116, 120-21 (4th Cir.1989).

The complaints here focus on Mobil's amendment of an ERISA-governed employee benefit plan and Mobil's disclosure to its employees of the terms of the plan. In addition to calculating their damages by computing lost benefits under the plan, a court adjudicating appellants' claims of a fraudulent scheme to reduce the work force would have to examine, at a minimum, the operation of the plan prior to the amendment, the language of the plan amendments, and Mobil's communication to its employees about the terms of the plan amendments. Given the breadth of the section 514(a) test, we find that these connections are adequate to warrant preemption.

This conclusion is buttressed by decisions of this and other courts addressing claims of fraudulently induced retirement and wrongful termination, which are the crux of appellants' state law claims here. In the closely analogous case of *Lee v. E.I. DuPont de Nemours and Co.*, 894 F.2d 755 (5th Cir.1990), the plaintiffs alleged that they had retired in reliance on their employer's representations that the company was not preparing to adopt an early retirement incentive plan, and they sued their

former employer for fraud and negligent misrepresentation in that respect. We held that the claims were preempted under section 514(a). *Id.* at 758; *see also Cefalu*, 871 F.2d at 1295 (breach-of-contract claim for oral misrepresentation that retirement options offered equivalent benefits was preempted); *Degan v. Ford Motor Co.*, 869 F.2d 889, 895 (5th Cir.1989) (claim for breach of an oral agreement to pay early retirement benefits was preempted). In a case almost identical to the present one, the Third Circuit held that where employees alleged that an employer's notification of proposed plan amendments misrepresented to them that they would lose a retirement benefit if they did not retire in a window period before the amendments became applicable, their claims were preempted. *Berger v. Edgewater Steel Co.*, 911 F.2d 911, 923 (3d Cir.1990), *cert. denied*, —— U.S. ——, 111 S.Ct. 1310, 113 L.Ed.2d 244 (1991).

In addition, the Supreme Court recently spoke decisively to the question whether a tort claim premised on wrongful discharge to prevent vesting of pension benefits could survive independently of ERISA. In *Ingersoll-Rand Co. v. McClendon*, —— U.S. ——, 111 S.Ct. 478, 483, 112 L.Ed.2d 474 (1990), the Court found that the claim "related to" an ERISA-covered plan under section 514(a). Appellants here seek to distinguish their "wrongful discharge by fraud" claim from the tort claim at issue in *McClendon*. They argue that whereas the existence of a pension plan is a necessary *element* of the cause of action considered in *McClendon* (discharge to prevent vesting of pension benefits), here the pension plan was merely the *subject* of Mobil's fraud. The fraud claim itself, they argue, is conceptually identical to a fraud claim concerning any other subject matter, and ERISA cannot generally preempt state laws prohibiting employers from fraudulently inducing employees to give up their jobs. Appellants rely on *Mackey v. Lanier Collections Agency and Service*, 486 U.S. 825, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988), in which the Court noted that

lawsuits based on "run-of-the-mill state-law claims such as unpaid rent, failure to pay creditors, or even torts committed by an ERISA plan" are not preempted merely because the suits are brought against an ERISA plan. *Id.* 108 S.Ct. at 2187.

We do not find this argument persuasive. We have previously noted that preempted state law includes any state law cause of action as it relates to an employee benefit plan, even if it arises under a general law which in and of itself has no connection to employee benefit plans. *Cefalu*, 871 F.2d at 1292 n. 5. Although there would undoubtedly be cases of fraudulently induced retirement that were not preempted, the specific conduct here, as in *Lee*, *Cefalu*, and *Degan*, relates directly to the operation of an ERISA plan. Superimposing state law fraud standards on the elaborate ERISA provisions governing the content and timing of notice of plan provisions and amendments, *see* ERISA §§ 102, 104(b)(1), 29 U.S.C. §§ 1022, 1024(b), would undercut the goal of uniform national regulation in the manner that section 514(a) seeks to prevent. *See Memorial Hospital System*, 904 F.2d at 245 (observing that preemption is proper where the state law claims address areas of exclusive federal concern, and where they directly affect the relationship among the traditional ERISA entities). In our view, this makes the conduct at issue here a far cry from the "run-of-the-mill" claims alluded to in *Mackey*.[3]

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[3] Appellants also cite *Greenblatt v. Budd Co.*, 666 F.Supp. 735 (E.D.Pa.1987), which does provide more direct support for their argument than the fact that the *subject* of the alleged fraud is pension benefits is incidental and does not waarant preemption. *See id.* at 742. However, we agree with the Seventh Circuit that *Greenblatt* is not consistent with our Circuit's holding in *Cefalu*. *See Lister v. Stark*, 890 F.2d 941, 945 n. 10 (7th Cir.1989), *cert. denied*, —— U.S. ——, 111 S.Ct. 579, 112 L.Ed.2d 584 (1990). Therefore, we, like the Seventh Circuit, decline to follow *Greenblatt*. *See id.* at 945.

For the same reason, appellants' reliance on *Hartle v. Packard Electric*, 877 F.2d 354 (5th Cir.1989) (per curiam) is misplaced. In *Hartle*, a discharged employee brought suit for wrongful termination and civil conspiracy to unlawfully terminate his employment. Because the general rule in Mississippi was employment at will, he argued that his participation in an employee benefit plan had removed his employment from employment-at-will status and had effectively given him a tenured position. However, because the employer's complained-of conduct did not pertain to the operation of an ERISA plan, we observed that Hartle's claim did "not in any manner implicate the federal regulation of employee benefit plans" and held that preemption was not proper. *Id.* at 356. Here, the employer's conduct *does* relate to the pension plan, and federal regulation of retirement plans is implicated to a much greater degree.

Finally, appellants argue that even if their state law claims are preempted to the extent that the damages sought are deemed to be "benefits," the preemption would not bar the claims in their entirety, and that the claims for lost wages, exemplary damages, and the like, would survive as state law claims. They rely on several cases finding partial preemption only. One is *Krause v. Dresser Industries, Inc.*, 910 F.2d 674 (10th Cir. 1990), in which a terminated employee filed claims under the ADEA and for breach of an implied contract for tenured job security. The district court entered summary judgment for the defendant on the breach-of-contract claim insofar as it sought lost pension, health insurance, or life insurance benefits, on the grounds of ERISA preemption. The Tenth Circuit upheld a verdict for the plaintiff on the claim for lost salary, however, stating, "We are at a loss to see how a breach of contract claim solely for lost salary is at all related to an employee benefit plan," and holding that there was no preemption of that claim. *Id.* at 680 (citing *Hartle*, *supra*). Likewise, in *Sorosky v. Burroughs Corp.*, 826 F.2d 794 (9th Cir. 1987), the Ninth Circuit held that an employee's claim

of breach of contract and wrongful discharge in part relied on theories independent of the benefit plan and thus was not entirely preempted. *Id.* at 800. Finally, appellants cite *Clark v. Coats & Clark, Inc.*, 865 F.2d 1237, 1245 (11th Cir. 1989), for the proposition that the same set of operative facts can give rise to both preempted and unpreempted causes of action.

We conclude that this type of partial preemption is inappropriate in the present case, however. Unlike *Krause*, this case is not one where the main nexus to an employee benefit plan is only the calculation of damages. Once stripped of its link to the pension plan provided by the measure of damages, the *Krause* plaintiff's claim survived as a suit for lost salary based upon breach of an implied contract of continued employment. Here, by contrast, the basis of the claims themselves is the operation of the pension plan: if appellants' claims were stripped of their link to the pension plans, they would cease to exist. The *Sorosky* and *Clark* courts employed a similar analysis which would support complete preemption in the present case. In *Sorosky*, the court held that Sorosky's claim that Burroughs agreed to provide him with monthly retirement benefits and then sought to prevent him from acquiring those benefits was preempted: it was only breach-of-contract or wrongful discharge theories "that have no relationship to the benefit plan" that survived as independent state law claims. *Sorosky*, 826 F.2d at 800. The *Clark* court confronted an employee's claim that his termination, in addition to being effected for the purpose of interfering with his attainment of pension benefits in violation of ERISA § 510, 29 U.S.C. § 1140, was carried out in a malicious manner that inflicted severe emotional distress upon him. The court held that the tort claim, though it "allude[d] to conduct which was proximate (or even concurrent) in *time* to the alleged ERISA violation," was "wholly remote in *content*": the employee had "not alleged any conduct on the part of Coats & Clark which relates to

the processing of any ERISA covered benefit or claim." *Clark*, 865 F.2d at 1243. However, *Clark* carefully distinguished the employee's claim there from a claim that a refusal to pay pension benefits was itself so outrageous as to amount to intentional infliction of emotional distress, which the court had found to be preempted in *Howard v. Parisian, Inc.*, 807 F.2d 1560 (11th Cir. 1987).

Because the underlying conduct at issue here cannot be divorced from its connection to the employee benefit plan, we uphold the district court's judgment that the state law claims are preempted in their entirety.

III. ERISA Standing

ERISA grants standing to a "participant" to bring a civil action to enforce his rights under the terms of a plan or to enforce the provisions of ERISA. ERISA § 502, 29 U.S.C. § 1132. The district court granted Mobil's motion to dismiss appellants' ERISA claims on the ground that appellants were not "participants" within the meaning of that section and therefore were not empowered to sue. *See Nugent v. Jesuit High School of New Orleans*, 625 F.2d 1285, 1286 & n. 3 (5th Cir. 1980).

ERISA defines the term "participant" to include "any employee or former employee . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan." ERISA § 3(7), 29 U.S.C. § 1002(7). The Supreme Court recently addressed the meaning of the "former employee" component of that definition. In *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989), the Court observed that the definition referred to "former employees who 'have . . . a reasonable expectation of returning to covered employment' or who have 'a colorable claim' to vested benefits." *Id.* 109 S.Ct. at 958 (quoting *Kuntz v. Reese*, 785 F.2d 1410, 1411 (9th Cir.)

(per curiam), *cert. denied*, 479 U.S. 916, 107 S.Ct. 318, 93 L.Ed.2d 291 (1986)). The Court also construed the "may become eligible" language of section 3(7) to mean that "a claimant must have a colorable claim that (1) he or she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future." *Id.*

Mobil argues that appellants do not have standing because they have neither a colorable claim for vested benefits nor a reasonable expectation of returning to covered employment. In Mitchell's suit against Mobil, the Tenth Circuit denied ERISA standing to the plaintiffs on the ground here urged by Mobil. *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463, 474 (10th Cir.), *cert. denied*, —— U.S. ——, 111 S.Ct. 252, 112 L.Ed.2d 210 (1990).

The first part of this conclusion finds support in the decisions of this Circuit. We have held that where, as here, retired employees received in a lump sum benefits that were concededly all to which they were entitled under a plan as it existed at their retirement, their claim is for damages, not vested benefits. *Yancy v. American Petrofina, Inc.*, 768 F.2d 707, 708-09 (5th Cir.1985) (per curiam); *Joseph v. New Orleans Electrical Pension & Retirement Plan*, 754 F.2d 628, 630 (5th Cir.), *cert. denied*, 474 U.S. 1006, 106 S.Ct. 526, 88 L.Ed.2d 458 (1985); *accord Kuntz*, 785 F.2d at 1411. In *Yancy*, the employer announced its intention to modify the interest rate factor used to calculate lump sum retirement benefits, but gave employees approximately three months in which to retire under the older, more generous discount rate. We denied standing to an employee who took early retirement during the three months, received his lump sum payment, then sued alleging that the amendment of the plan violated fiduciary duties imposed by ERISA. We held that, lacking a claim for vested benefits, he could not be deemed a plan "participant." *Yancy*, 768 F.2d at 709.

For the second part of its conclusion—that the plaintiff lacked a reasonable expectation of returning to covered employment—the *Mitchell* court relied on the fact that the plaintiff had not sought reinstatement. *Mitchell*, 896 F.2d at 474; *see also Berger v. Edgewater Steel Co.*, 911 F.2d 911, 922 (3d Cir.1990), *cert. denied*, —— U.S. ——, 111 S.Ct. 1310, 113 L.Ed.2d 244 (1991); *Kuntz*, 785 F.2d at 1411. In the present case, the only request for reinstatement in appellants' original complaint is in the ADEA claim, which we have held to be barred by the statute of limitations. *See* section I, *supra*. However, this request does indicate that appellants do desire court-ordered reinstatement.

We are not convinced that *Firestone* can be read to reduce the standing question to a straightforward formula applicable in all cases. This seems particularly so in cases involving allegations of discharge. ERISA § 510, 29 U.S.C. § 1140, makes it unlawful for an employer to "discharge, fine, suspend, expel, discipline, or discriminate against a participant" for exercising a right provided by ERISA or "for the purpose of interfering with the attainment" of a right provided by ERISA. The Supreme Court's recent *McClendon* decision held that this provision would foreclose the development of any state law cause of action for wrongful termination to prevent vesting of pension benefits. *Ingersoll-Rand Co. v. McClendon*, —— U.S. ——, 111 S.Ct. 478, 485, 112 L.Ed.2d 474 (1990). The implication of the Court's holding that the discharged employee must look solely to ERISA for his remedy is that he would have standing to do so. Nevertheless, it is not readily apparent that he would have standing under the construction of *Firestone* urged by Mobil; he would be a former employee lacking both a claim for vested benefits and (unless he requested reinstatement) a reasonable expectation of returning to covered employment. It would be unusual if in that situation his ability to assert a claim at all turned on whether or not his requested

relief included reinstatement; it would seem more logical to say that but for the employer's conduct alleged to be in violation of ERISA, the employee *would* be a current employee with a reasonable expectation of receiving benefits, and the employer should not be able through its own malfeasance to defeat the employee's standing. *Cf. Amalgamated Clothing and Textile Workers v. Murdock*, 861 F.2d 1406, 1418 (9th Cir.1988) ("It would be ironic if the very acts of benefit payment and plan termination that allegedly resulted in a fiduciary personally obtaining ill-gotten profits should also serve to deny plan beneficiaries standing . . . to redress the fiduciaries' alleged breach of the duty of loyalty.").[4]

Therefore, recognizing that we are anchored at one end by *Yancy*, we also believe that *Yancy* does not extend so far as to encompass situations such as the one at issue in *McClendon*. The question then becomes where on that axis the present case falls. A few pertinent distinctions between the two cases bear emphasis. Yancy's position as a retired employee who had received lump sum benefits was largely of his own making. He was informed of the plan amendment and of the effects of each option open to him. Our holding in the case amounts to a decision that he could not both accept the offered inducement for early retirement and then later complain of the choice to which he had been put, if he felt that he was entitled to continue to work and then retire at the time of his choice with a lump sum calculated at the old rate, he was obligated to act consistently with his desired relief by remaining a covered employee

[4] We do not mean to imply that an employee's entitlement to certain *remedies* might not turn on whether or not he was willing to return to work. If, for example, he claimed entitlement to the fully vested pension as damages, it might be perfectly reasonable to require that he return to work at least for the additional length of time required for the pension to vest. However, a wrongful discharge might give rise to other damages as well, for which reinstatement would not seem to be a logical prerequisite.

and challenging the plan amendment. The violation he alleged—an amendment of the retirement plan that amounted to a breach of fiduciary duty under ERISA § 409, 29 U.S.C. § 1109—was not one that in and of itself divested aggrieved parties of their status as covered employees able to sue. McClendon, on the other hand, had no such choice. A discharge to prevent vesting of benefits in violation of section 510 by definition must be challenged by someone other than a current employee or someone with a claim to vested benefits. Thus, the standing question and the merits of an employee's claim are unavoidably intertwined to some degree; whether a plaintiff has standing to assert ERISA rights may depend upon whether he can establish a discharge or some other conduct in violation of ERISA, but for which he would have standing. *See Amalgamated Clothing*, 861 F.2d at 1410.

The Third Circuit alluded to this problem in its recent *Berger* decision. There, Edgewater Steel amended its retirement plan to eliminate two benefits: a lump sum payment in place of the first three months of pension benefits, and a supplemental payment given as an early retirement benefit to employees whose retirement was in the mutual interests of the company and the retiree and was approved by the company. Upon announcement of these changes, Berger and the other plaintiffs chose to retire before the amendments became effective. They each received the three-month lump sum provided automatically to all retirees, but none were approved for the supplemental payment. Among the plaintiffs' allegations were a charge that the elimination of the three-month lump sum amounted to the elimination of an accrued benefit in violation of ERISA § 204(g), 29 U.S.C. § 1054(g), and a charge that the amendment constituted an intentional interference with their right to both benefits, in violation of ERISA § 510, 29 U.S.C. § 1140. The court, citing *Kuntz* and *Yancy*, held that the plaintiffs

did not have standing to assert their section 204(g) claim because they had retired and accepted the benefits in a lump sum, and had not asked for reinstatement. *Berger*, 911 F.2d at 921-22. However, the court noted the contingency of this conclusion on the denial of the plaintiffs' section 510 claim. *Id.* at 922. It stated: "Of course, we recognize that if the Employees were constructively discharged as they do claim, they would not necessarily have to return to work in order to have standing to claim a make whole remedy." *Id.*[5]

On the record before us, we cannot say where on the spectrum between *Yancy* and *McClendon* this case falls. Because appellants pleaded their ERISA claims only as contingent on preemption of their state law claims, and because the district court did not rule on the merits of the ERISA claims, appellants have not fleshed out their ERISA claims and theories, or even identified with pre-

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[5] A Third Circuit decision in a pre-*Firestone* case provides an even more direct illustration of the contingency of standing on the nature of the ERISA violation alleged. In *Saporito v. Combustion Engineering Inc.*, 843 F.2d 666 (3d Cir.1988), *vacated*, 489 U.S. 1049, 109 S.Ct. 1306, 103 L.Ed.2d 576 (1989), the plaintiffs claimed that they had been induced to retire under one retirement plan while the employer concealed the development of a second plan with more favorable terms. The court held that they did not have standing as participants in the first plan to sue for breach of fiduciary duties because they had retired and received all of the benefit to which they were entitled in a lump sum. *Id.* at 671. However, the court did hold that they had standing as participants in the *second* plan to argue that they had been tricked into retiring in violation of section 510, because they alleged that "but for the selective divulgence of information, they would have been members of [the second plan], and, for the purposes of standing to bring an action under ERISA, should be considered as such." *Id.* at 672; *see also id.* at 672 n. 7 (distinguishing *Stanton v. Gulf Oil Corp.*, 792 F.2d 432 (4th Cir. 1986), in which the plaintiff urged "but for" participant standing, but his claim was rejected because the events precluding standing were under his control). *Saporito* was vacated and remanded by the Supreme Court for further consideration in light of *Firestone*, 489 U.S. 1049, 109 S.Ct. 1306, 103 L.Ed.2d 576 (1989).

cision which sections of ERISA they claim were violated. However, their allegations do at least suggest an assertion that they were constructively discharged in violation of section 510 and that but for Mobil's nondisclosure they would be covered employees with standing to challenge the plan amendment. They allege deceptive conduct by Mobil that might be found to vitiate the voluntariness of their decision to retire and that might distinguish the present case from both *Yancy* and *Mitchell*. Appellants also sought reinstatement in their ADEA action, and did not affirmatively indicate that reinstatement was not sought under their ERISA claims. For these reasons, we cannot now foreclose the possibility that they could prove facts that would create standing for them, and we believe that the trial court's dismissal on the pleadings of the ERISA claims was premature. Of course, appellants can, and doubtless should, be required to plead their ERISA claims with greater specificity.

We emphasize that we have not determined that appellants will be able to establish a violation of section 510, only that they should be allowed to attempt to do so. We reverse the trial court's dismissal of appellants' ERISA claims and remand for further proceedings consistent with this opinion.

Conclusion

For the reasons stated above, we affirm the district court's grant of summary judgment to Mobil on the ADEA claims and its grant of judgment on the pleadings for Mobil on all of appellants' state law claims. However, we reverse and remand the district court's dismissal of appellants' ERISA claims.

AFFIRMED In Part; REVERSED And REMANDED In Part.

Order of the United States District Court for the Eastern District of Texas granting Motion for Judgment on the Pleadings and Motion to Dismiss, June 22, 1990

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

Civ. No. B-89-0653-CA

June 22, 1990

GERALD W. CHRISTOPHER, *et al.*,
Plaintiffs,

—v.—

MOBIL OIL CORPORATION, *et al.*,
Defendants.

ORDER

1. CAME ON to be considered the Motion for Judgment on the Pleadings and Motion to Dismiss filed by defendants Mobil Oil Corporation, the Retirement Plan of Mobil Oil Corporation and Rex Adams (collectively, "Mobil"); and the Court, having considered such Motion, the supporting memorandum, and plaintiffs' opposition thereto, finds:

A. Plaintiffs' state-law claims are preempted by the Employee Retirement Income Security Act of 1974 ("ERISA") because those claims relate to Mobil's Retirement Plan, which is governed by ERISA, and directly overlap with provisions of ERISA;

B. Plaintiffs are not participants seeking to recover benefits under Mobil's Retirement Plan and therefore have no cause of action under ERISA § 502; and

C. The Court lacks jurisdiction over plaintiffs' ERISA claim because plaintiffs do not have a cause of action under ERISA.

2. Based on these findings, the Court is of the opinion that said motion should be in all things GRANTED.

3. It is therefore ORDERED, ADJUDGED and DECREED by the Court that defendants' Motion for Judgment on the Pleadings and Motion to Dismiss be, and the same hereby is, GRANTED and the case dismissed in its entirety with prejudice, at plaintiffs' cost.

SIGNED THIS 22nd DAY OF JUNE, 1989 [sic].

/s/ Richard A. Schell
United States District Judge

Order of the United States District Court for the Eastern District of Texas granting Motion for Summary Judgment, June 22, 1990

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

Civ. No. B-89-0653-CA

June 22, 1990

GERALD W. CHRISTOPHER, *et al.*,
Plaintiffs,

—v.—

MOBIL OIL CORPORATION, *et al.*,
Defendants.

ORDER

1. CAME ON to be considered the Motion for Summary Judgment filed by defendants Mobil Oil Corporation, the Retirement Plan of Mobil Oil Corporation and Rex Adams (collectively, "Mobil"); and the Court, having considered such Motion, the supporting memorandum, statement of undisputed facts, declaration and affidavit, and plaintiffs' opposition thereto, finds:

A. Plaintiffs' Age Discrimination in Employment Act ("ADEA") claims are time-barred because (*i*) plaintiffs did not file an age-discrimination charge with the Equal Employment Opportunity Commission within 300 days after the alleged discrimination occurred (29 U.S.C. § 626(d)(2)), and (*ii*) plain-

tiffs did not file a lawsuit under ADEA within three years after the alleged discrimination occurred (29 U.S.C. §§ 255(a), 626(e));

B. Plaintiffs' state-law claims are time-barred by applicable statutes of limitations;

C. Plaintiffs were not constructively discharged in violation of ADEA; and

D. Plaintiffs' claims of discrimination arise from changes in the fringe benefits available under Mobil's bona fide Retirement Plan, not from any conduct related to the nonfringe-benefit aspects of plaintiffs' employment, and are therefore not within the scope of ADEA pursuant to 29 U.S.C. § 623(f)(2).

2. Based on these findings, the Court is of the opinion that said motion should be in all things GRANTED.

3. It is therefore ORDERED, ADJUDGED and DECREED by the Court that defendants' Motion for Summary Judgment be, and the same hereby is, GRANTED and the case dismissed in its entirety with prejudice, at plaintiffs' cost.

SIGNED THIS 22nd DAY OF JUNE, 1989 [sic].

/s/ Richard A. Schell
United States District Judge

Order of the United States Court of Appeals for the Fifth Circuit denying appellants' petition for rehearing, February 24, 1992

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-4562

Filed: Feb. 24, 1992

GERALD W. CHRISTOPHER, CHARLES L. PRUNTY and BILLY G. TURNER,
Plaintiffs-Appellants,

versus

MOBIL OIL CORPORATION, RETIREMENT PLAN OF MOBIL OIL CORPORATION AND REX ADAMS,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas

ON PETITION FOR REHEARING

Before:

HENLEY*, KING, and GARWOOD,
Circuit Judges.

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* Circuit Judge of the Eighth Circuit, sitting by designation.

PER CURIAM:

IT IS ORDERED that appellants' petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ Will Garwood
United States Circuit Judge

Denial of Motion for Summary Judgment of the United States District Court for the District of Colorado, dated June 25, 1992

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[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 88-Z-2112

FREDERIC J. RAYMOND, *et al.*,
Plaintiffs,

vs.

MOBIL OIL CORPORATION, *et al.*,
Defendants.

REPORTER'S TRANSCRIPT

(Hearing on Motion for Summary Judgment)

Proceedings before the HONORABLE ZITA L. WEINSHIENK, Judge, United States District Court for the District of Colorado, commencing at 9:50 a.m., on the 25th day of June, 1992, Courtroom C-502, United States Courthouse, Denver, Colorado.

APPEARANCES

PRYOR, CARNEY, and JOHNSON, P.C., by RODNEY R. PATULA and ELIZABETH MORAN, Attorneys at Law, 6200 South Syracuse Way, Suite 400, Englewood, Colorado, 80155, appearing for the plaintiffs.

HADDON, MORGAN & FOREMAN, P.C., by HAROLD A. HADDON and MAUREEN A. CAIN, Attorneys at Law, 150 East Tenth Avenue, Denver, Colorado, 80203; LOREN

KIEVE, Attorney at Law, Debevoise & Plimpton, 555 13th Street, N.W., Washington, D.C., [2] 20004, and MICHAEL E. TIGAR, Attorney at Law, 727 East 26th Street, Austin, Texas, 78705, appearing for the defendant.

* * * *

THE COURT: Thank you.

I think perhaps we should start, if you want to just have a seat for a moment—

MR. TIGAR: Yes, your Honor.

THE COURT: —by my telling you how this looks to me on the briefing and on the paper. This is a motion for summary judgment on the ERISA claims, and it appears to me from looking at the briefs, from looking at the claims, from reviewing the *Christopher v. Mobil Oil* case in the Fifth Circuit and the [3] *Mitchell v. Mobil Oil* case in this circuit and all of the other cases that have been decided, including *Firestone*, that what Plaintiff has done in pleading this ERISA or these ERISA claims is to fit them as closely as possible under the rulings of *Christopher* and trying to avoid in the pleading the adverse effects of rulings of *Mitchell*. And it appears to me also that reading *Christopher* carefully, there are factual issues which were left open under *Christopher*, which were not discussed in *Mitchell*, which probably this court is going to have to try.

Now, that's how it looks on paper; and I'm certainly going to listen to the arguments of the defendants as to why this is not the case. But I think we have some primary cases here to consider. Well, the two core cases that were argued in the briefs were the *Christopher* case and the *Mitchell* case. But if this case is fit very carefully under the ruling in *Christopher* and does not appear to be covered by the ruling in *Mitchell*, then the motion will have to be denied.

* * * *

[38]

RULING

THE COURT: Well, let me address *Boren*. Mr. Boren was not an employee within the meaning of ERISA; and when he asked to be treated as if he were a former employee, he is asking for a determination that he was at one time an employee, as opposed to the position of the plaintiffs. As I understand Plaintiffs' theory is saying that but for the actions of Defendant, they still would be employees of Defendant; and this case is predicated on the fact that they were employees at one time, unlike Boren.

I realize that Judge McKay, who this court has the most high respect for—and I do for Judge Moore, too, and all the Tenth Circuit judges—made some statements in *Boren* which appear to be fairly broad statements. But indeed, in looking at the facts of *Boren*, they were talking about a factual situation which does not appear to me, at least, to apply in this case.

There are many rules and many cases about granting motions for summary judgment, and I think judges sometimes overlay on this law their own experiences with summary judgment. Having been a judge for a long time, I have an overlay; and that is, it's sort of like the old "I know it when I see it," which used to be the rule in pornography cases. When I am [39] comfortable that there are no factual issues and when I can grant something as a matter of law, when I have that feeling that there are no factual issues, when I have to decide the case on summary judgment and all the facts and the arguments convince me of that, then I grant the motion for summary judgment—you know—considering all of the other cases that are there on summary judgment.

But when I have this lingering feeling that there may be factual issues, even though I think probably there is going to be a difficult time, there is going to be a difficult effort of plaintiff to prove these factual issues—I don't

think it's going to be easy; I think it's going to be most difficult—when I have this nagging feeling that well, I'm not sure as a matter of law that we've really taken care of all factual issues, then I simply have to resolve it by denying the motion for summary judgment.

Now, what we have here are two very important cases, one in the Tenth Circuit and one in the Fifth Circuit. And the question is, can they be distinguished? Does the Fifth Circuit carve out an area which was not considered by the Tenth Circuit and which has to be considered by this court, even in view of the strong ruling of the Tenth Circuit?

And I will admit, as much respect as I do have for the judges that decided *Mitchell v. Mobil*, I really do wonder if they read my opinion carefully on the ERISA claims in finding [40] that he didn't seek reinstatement—that Mr. *Mitchell* didn't.

Be that as it may, that's the rule. I'm bound by that decision. I have no intent to be overruled in the Tenth Circuit, if I can uphold it; and what we have, then, is the Fifth Circuit carving out a little area from Mobil and saying, if I can just paraphrase what they say on 1223 of their opinion—and maybe I better put this on the record. For the record, *Christopher v. Mobil* is 950 F.2d 1209, Fifth Circuit, 1992. What they say is here's an area that might—might; it isn't for sure—might distinguish this case from *Mitchell*, and that is if a plaintiff is alleging deceptive conduct which vitiates the voluntariness of the decision to retire, the "but for" test, that might distinguish this case from *Mitchell*.

Plaintiffs have fit in this case right to that exception; and they say, We are alleging and we intend to prove—now, I don't know if they're going to be able to prove it; it's going to be tough—but we are alleging and we intend to prove deceptive conduct which will show that none of these plaintiffs would have retired, had they not been deceived, had they not been defrauded. We're talking about fraud here.

Maybe it was hinted at in *Mitchell*, and I don't know what you folks argued; but it really didn't come out that way, it seems to me, in the trial that strongly.

So here's an area: Mitchell (sic), they're arguing, we're alleging, committed fraud on us, deceived us. We would [41] not have retired had we known the truth, had we not been deceived, had we not been defrauded.

The Fifth Circuit, good judges, say this distinguishes or this might distinguish this case from *Mitchell*. All these circuit judges are supposed to be really experts in the law, may be experts in the law more than the trial judges. At least they have the last word. So here are the judges, the three judges on the Fifth Circuit saying, Here's an area that's different, might be distinguished.

I'm not going to say it can't be distinguished. I've got that feeling that boy, I'm not sure. I'm not sure that they can't prove it. And if they can they can prove it, they have to have the chance to prove it.

I think one must read the law also with good common sense and good judgment; and if, indeed, hypothetically an employee has been deceived by an employer—I'm not talking about Mobil now, but just what is the policy, what should be the law. If an employee has been deceived, defrauded by the employer, and retires because of that deceit when they never would have retired, does that mean they can't sue under 510, just because they've taken benefits? And common sense tells us there have to be—there has to be an exception to the flat rule stated in *Mitchell*, and this deceptive conduct certainly from a matter of policy, from a matter of good common sense, seems to be that area.

[42] So even though there might be a bright line rule in *Mitchell*, there appears to this court that there might very well be, as stated by the *Christopher* court, a way of distinguishing that; and that is if there is deceptive conduct.

Now, if the plaintiffs can prove it—I don't know if they can prove it sufficiently—but if they can prove it,

then I think we do have a distinguishing feature and I think they have brought their case in an area that fits under—fits under the *Christopher* case and may very well be an area which would cause the Tenth Circuit to say, You know, we didn't really mean that. We really didn't mean that if there is something promised the following year and then they're defrauded and they're retiring because they're defrauded that the ERISA—that they're foreclosed from suing under ERISA.

So looking at the statute with good judgment and what the policy should be, which is to protect the employees, looking at the fact that these were employees, their allegation is that they would not have retired. They have brought this case under the very narrow confines of *Christopher*.

I don't feel I can grant the motion for summary judgment; and accordingly, the motion for summary judgment on the ERISA claims will be denied and we'll have to hear what the facts are.

Now, one more thing: We now no longer have motions for directed verdict in Federal Court. We have motions for [43] judgment on the law. The rules have been changed. So if, indeed, this proof does not come forward, I'll be hearing your argument, maybe not even at the end of the plaintiffs' case maybe in the middle of the plaintiffs' case, when they have a chance to go through ERISA, whichever one they're going to prove first. But this is something that I'm sure that will come up for argument in the trial case—in the trial.

* * * *

STATUTORY PROVISIONS

ERISA § 3(7), 29 U.S.C. § 1002(7)

For purposes of this subchapter:

* * * *

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

ERISA § 502, 29 U.S.C. § 1132

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant of beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary *(A)* to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or *(B)* to obtain other appropriate equitable relief*(i)* to redress such violations or *(ii)* to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of [section] 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary *(A)* to enjoin any act or practice which violates any provision of this subchapter, or *(B)* to obtain other approrpiate equitable relief *(i)* to redress such violation or *(ii)* to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (c)(2) or *(i)* or *(l)* of this section.

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions

(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of Title 26 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) of this section with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if—

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 1145 of this title.

(c) Administrator's refusal to supply requested information; penalty for failure to provide annual report in complete form

(1) Any administrator (*A*) who fails to meet the requirements of paragraph (1) or (4) of section 1166 of this title or section 1021(e)(1) of this title with respect to a participant or beneficiary, or (*B*) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

(2) The Secretary may assess a civil penalty against any plan administrator of up to $1,000 a day from the date of such plan administrator's failure or refusal to file the annual report required to be filed with the Secretary under section 1021(b)(4) of this title. For purposes of this paragraph, an annual report that has been rejected under section 1024(a)(4) of this title for failure to provide material information shall not be treated as having been filed with the Secretary.

(3) Any employer maintaining a plan who fails to meet the notice requirement of section 1021(d) of this title with respect to any participant or beneficiary or who fails to meet the requirements of section 1021(e)(2) of this title with respect to any person may in the court's discretion be liable to such participant or beneficiary or to such person in the amount of up to $100 a day from the date of such failure, and the court may in its discretion order such other relief as it deems proper.

(d) Status of employee benefit plan as entity

(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpoena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties

The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan—

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of—

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

(h) Service upon Secretary of Labor and Secretary of Treasury

A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) of this section which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) of this section on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty

In the case of a transaction prohibited by section 1106 of this title by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved in each such transaction (as defined in section 4975(f)(4) of Title 26) for each year or part thereof during which the prohibited transaction continues, except that, if the transaction is not corrected (in such manner as the Secretary shall prescribe in regulations which shall be consistent with section 4975(f)(5) of Title 26) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of Title 26.

(j) Direction and control of litigation by Attorney General

In all civil actions under this subchapter, attorneys appointed by the Secretary may represent the Secretary

(except as provided in section 518(a) of Title 28), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Jurisdiction of actions against the Secretary of Labor

Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this chapter, or to compel him to take action required under this subchapter, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

(*l*) Civil penalties on violations by fiduciaries

(1) In the case of—

(A) any breach of fiduciary responsibility under (or other violation of) part 4 by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person,

the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1)—

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted

by the Secretary under subsection (a)(2) or (a)(5) of this section.

(3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that—

(A) the fiduciary or other person acted reasonably and in good faith, or

(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of Title 26.

ERISA § 510, 29 U.S.C. § 1140

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C. § 301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

Supreme Court, U.S.
FILED
AUG 5 1992
OFFICE OF THE CLERK

No. 91-1881

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MOBIL OIL CORPORATION, THE RETIREMENT PLAN OF MOBIL OIL CORPORATION, and REX ADAMS,

Petitioners,

—v.—

GERALD W. CHRISTOPHER, CHARLES L. PRUNTY, and BILLY G. TURNER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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August 5, 1992

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IN THE

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OCTOBER TERM, 1991

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MOBIL OIL CORPORATION, THE RETIREMENT PLAN OF MOBIL OIL CORPORATION, and REX ADAMS,
Petitioners,

—v.—

GERALD W. CHRISTOPHER, CHARLES L. PRUNTY, and BILLY G. TURNER,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

Respondents' ("plaintiffs' ") opposition underscores why certiorari should be granted.

I.

Ingersoll-Rand Neither Dealt with ERISA Standing Nor Modified *Firestone*—and the Court Needs to Clarify this Point.

Ingersoll-Rand Co. v. McClendon, 111 S. Ct. 478 (1990), does not even mention the word "standing" or ERISA's definition of "participant," does not discuss standing under ERISA § 510, does not mention the Court's unanimous holding in *Firestone Tire & Rubber*

Co. v. Bruch, 489 U.S. 101 (1989)—the Court's seminal decision construing the defined term "participant"—and, in short, has nothing to do with ERISA standing. *See* Mobil Pet. at 14-16.[1]

That plaintiffs (and the Fifth Circuit) suggest otherwise confirms why the Court should grant certiorari to put to rest the confusion and uncertainty *Firestone* was supposed to end.

II.

ERISA Standing Should Be Decided Now to Carry Out Congressional Intent and Prevent Waste of Scarce Judicial Resources.

Mobil's petition raises a purely legal issue of statutory construction. The Fifth Circuit's decision needs, and is ripe for, immediate review.

The issue is not whether plaintiffs can prove sometime in the future that they would have standing under the Fifth Circuit's "but-for" analysis, but whether the whole idea of "but-for" standing is wrong as a matter of law—because (among other reasons) it conflicts with ERISA's statutory language, *Firestone* and the decisions of the other Circuits that have addressed the issue. Mobil Pet. at 7-16.

The Court has not hesitated to grant certiorari where a court of appeals has reversed a district court's dismissal of a complaint for lack of standing and remanded for application of a questionable legal theory. *E.g.*, *Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177, 3185 (1990); *Allen v. Wright*, 468 U.S. 737, 748-49 (1984); *Blue Shield of Va. v. McCready*, 457 U.S. 465, 470-72 (1982); *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 469-70 (1982).

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1 "Mobil Pet." refers to Mobil's petition for certiorari.

The Court should do so here. Plaintiffs admit [at 22-24] that the result of the Fifth Circuit's "but-for" analysis is to place the issue of former employees' ERISA standing under the cloud that *Firestone* sought to dispel, and that years of expensive litigation will be required to articulate the doctrine's precise contours. These admissions only confirm the need for prompt review to restore the predictability that ERISA was intended to establish. Mobil Pet. at 18-21; *see also Patterson v. Shumate*, 112 S. Ct. 2242, 2250 (1992) (an "important policy underlying ERISA [is the] uniform national treatment of pension benefits"); *Sandoval v. Aetna Life & Casualty Ins. Co.*, No. 90-2217, 1992 U.S. App. Lexis 13517, at *17 (10th Cir. June 16, 1992) (Congress sought to reduce "mounting costs of administering a plan" and " 'the number of frivolous lawsuits under ERISA' ").[2]

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2 Contrary to plaintiffs' suggestion [at 23], the Court should not wait for a possible appeal under 28 U.S.C. § 1292(b) in another case litigated by plaintiffs' lawyers, *Raymond v. Mobil Oil Corp.*, No. 88-Z-2112 (D. Colo. June 25, 1992).

First, the uncertainties *Christopher* has created require authoritative guidance from the Court. The number of recent district court cases plaintiffs cite—including *Raymond* itself—illustrates why a dispositive decision from the Court is so important.

Second, even if the Tenth Circuit permits a § 1292(b) appeal (which plaintiffs' lawyers have opposed), it may affirm or reverse on grounds other than those set forth by the district court or in the certified question (which does not cite *Christopher*). *In re Cinematronics, Inc.*, 916 F.2d 1444, 1448 (9th Cir. 1990); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1002 n.2 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 915 (1987). There is therefore no guarantee that *Raymond* will provide the Court with an opportunity to address this threshold issue.

Third, Mobil (as well as other litigants in the Fifth and other Circuits) should not be subjected to the uncertainties wrought by *Christopher*—and the expense of further litigation—regardless of what (if anything) the Tenth Circuit may do in *Raymond*. *See Sandoval*, *supra*; *see also* Mobil Pet. at 21.

III.

The Decision Below Conflicts with *Firestone* (and Decisions of Other Circuits).

A. The Holding that the Defined Term "Participant" Means Different Things in the Same Statute Conflicts With *Firestone*.

In *Firestone*, the Court construed ERISA § 3(7)'s definition of "participant," 29 U.S.C. § 1002(7).

It held that former employees are not "participants" entitled to sue under ERISA § 502(a), 29 U.S.C. § 1132(a), unless they " 'have a reasonable expectation of returning to covered employment' or . . . a 'colorable claim' to vested benefits." 489 U.S. at 117 (quoting *Kuntz v. Reese*, 785 F.2d 1410, 1411 (9th Cir.) (per curiam), *cert. denied*, 479 U.S. 916 (1986)).

Plaintiffs here have neither. Before they filed suit (four years after they retired), they never asked (or suggested) that Mobil rehire them. And they received all their vested benefits when they retired more than seven years ago.

The Fifth Circuit, however, opined that *Firestone*'s construction of the defined term "participant" was *not* "applicable in all cases." [22a.[3]]

The court said that, in "cases involving *allegations* of discharge," former employees could bring an ERISA suit—without having *either* "a colorable claim to vested benefits" *or* "a reasonable expectation of returning to covered employment" [22a-23a (emphasis added)]—as long as they "claimed" that "but for" their allegedly wrongful discharge they would have been "participants."

This Court has repeatedly emphasized that "a word is presumed to have the same meaning in all subsections of

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3 Appendix citations are to the appendix to Mobil's certiorari petition.

the same statute," *Morrison-Knudsen Constr. Co. v. Director, OWCP*, 461 U.S. 624, 633 (1983); *accord Patterson v. Shumate*, 112 S. Ct. at 2246-47 & n.2; *id.* at 2251 (Scalia, J., concurring)—particularly where it is a statutorily defined term.

On this ground alone, certiorari is necessary. If the Fifth Circuit is correct that the same statutorily defined word can mean two (or more) very different things in different parts of the same statute—and that *Firestone*'s holding is *not* "applicable in all cases" [22a] (or, in plaintiffs' words [at 15], "differs depending upon the nature of the ERISA claim asserted")—ERISA litigants and the lower courts need to have this Court authoritatively say so.

B. "But For" Standing also Conflicts with *Firestone* (and with Decisions of Other Courts of Appeals).

Plaintiffs do not meet either part of *Firestone*'s two-pronged definition of "participant."

The Fifth Circuit correctly held that, "where, as here, retired employees received in a lump sum benefits that were concededly all to which they were entitled under a plan as it existed at their retirement, their claim is for *damages*, not vested *benefits*." [21a (emphasis added).] The court therefore recognized that plaintiffs did not meet *Firestone*'s first prong because they did not have a colorable claim to *benefits*. [*Id.*] *See* Mobil Pet. at 16-17.

But the Fifth Circuit allowed plaintiffs to continue their ERISA suit even though they could not satisfy *Firestone*'s second prong: that they have a "reasonable expectation of returning to covered employment."

Instead, the court articulated a contrary (and conflicting) test: when a former employee alleges a wrongful discharge, his or her standing to sue under ERISA depends on whether "*but for* the employer's conduct

alleged to be in violation of ERISA, the employee *would* be a current employee with a reasonable expectation of receiving benefits." [23a (second emphasis in original).]

Firestone, however, pointed out that the notion of "but-for" standing "begs the question of who *is* a 'participant' and renders the definition set forth in [ERISA § 3(7)] superfluous." 489 U.S. at 117 (emphasis added).[4]

In the short time since Mobil filed its certiorari petition, the Eleventh Circuit has also held—in conflict with the Fifth Circuit—that a former employee who claims he would not have retired "but for" a misrepresentation about changes in available pension benefits cannot sue as a "participant" under ERISA. *Sanson v. General Motors Corp.*, No. 91-8528, 1992 U.S. App. Lexis 15830, at *1-2, *9-14 (11th Cir. July 15, 1992); *cf. Boren v. Southwestern Bell Tel. Co.*, 933 F.2d 891, 893 (10th Cir. 1991) (claim that plaintiff "should have been" a "participant" "falls without the jurisdictional grant of ERISA").

We respectfully submit that the Eleventh and other Circuits are correct; the Fifth Circuit is wrong; and now is the time for this Court to resolve a fundamental issue that, as a result of the Fifth Circuit's deci-

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4 Plaintiffs cannot reconcile *Christopher*'s "but for" analysis with the decisions of other courts by arguing [at 21] that the Fifth Circuit's approach depends on a former employee's ability to show that he or she *was* a plan "participant" at the time of the alleged ERISA violation. The Fifth Circuit's construction rests on the broader, counterfactual claim that, but for the alleged violation, the former employee "*would* be" a current employee with standing to sue. [23a (emphasis in original.)]

The former employees in *Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 435 (4th Cir. 1986), and *Freeman v. Jacques Orthopaedic & Joint Implant Surgery Medical Group, Inc.*, 721 F.2d 654, 655-56 (9th Cir. 1983), also claimed they *would have been* participants in benefit plans if they had not been fraudulently induced not to be—and therefore could also have brought ERISA suits under the Fifth Circuit's "but for" standing analysis.

sion, is creating turmoil in the lower courts—and in the ability of companies across the country to comply with ERISA's comprehensive statutory framework. *See* Mobil Pet. at 18-21.

IV.

ERISA Standing Cannot Be Judicially Created: ERISA Protects Benefits, Not Employment.

Plaintiffs would have this Court hold that ERISA § 510 overrides employment agreements or state-law employment-at-will doctrines and "reaches . . . conduct that harms the employment relationship," independent of any "deprivation of benefits." [Pl. Br. at 16; *accord id.* at 24.]

This theory fundamentally misconstrues the purpose of both ERISA and § 510.

Section 510—like ERISA's other provisions—protects *benefits*, not jobs. *Firestone*, 489 U.S. at 113 ("ERISA was enacted . . . 'to protect contractually defined benefits' "); Mobil Pet. at 16-21.

ERISA does this by "ensuring that 'if a worker has been promised a defined pension benefit upon retirement—*and if he has fulfilled whatever conditions are required to obtain a vested benefit*—he actually will receive it.' " *Patterson v. Shumate*, 112 S. Ct. at 2250 (emphasis added) (citation omitted).

ERISA § 510 therefore provides a private remedy to the extent—but only to the extent—that an employer's conduct is aimed at preventing an employee from receiving his or her accrued *benefits*.[5]

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5 *E.g.*, *Humphreys v. Bellaire Corp.*, No. 91-3584, 1992 U.S. App. Lexis 12543, at *16-18 (6th Cir. June 4, 1992); *Simmons v. Willcox*, 911 F.2d 1077, 1082 (5th Cir. 1990); *Turner v. Schering-Plough Corp.*, 901 F.2d 335, 347-48 (3d Cir. 1990);

The purpose of § 510 is to prevent an employer from "circumvent[ing] the provision of promised benefits" by firing an employee before he or she can fulfill eligibility requirements for receiving retirement benefits for past years of service. *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. at 485; *see, e.g.*, 2 Legislative History of the Employee Retirement Income Security Act of 1974, 1774 (1976) ("no vesting formula will produce real employee protection so long as employers are free to fire employees to defeat pension eligibility"); *accord id.* at 1758, 1811, 1836; *see also West v. Butler*, 621 F.2d 240, 245 (6th Cir. 1980) (describing § 510's legislative history).

ERISA § 510 is not—and was never intended to be—an omnibus federal wrongful-discharge statute for any employee who happens to be covered by an employee-benefit plan.

Consistent with ERISA's basic purpose of protecting *benefits*, § 510 itself provides that "[t]he provisions of section [502] shall be applicable in the enforcement of this section" (a sentence that plaintiffs omit in their brief [at 10]). Section 502(a), in turn, allows only "participant[s]" (and their beneficiaries) to sue—and a "participant" is defined as an employee or former employee "who is or may become eligible to receive a *benefit*," ERISA § 3(7) (emphasis added).[6]

Dister v. Continental Group, Inc., 859 F.2d 1108, 1111 (2d Cir. 1988); *Lojek v. Thomas*, 716 F.2d 675, 680-81 (9th Cir. 1983).

The cases plaintiffs cite [at 16, 24] hold that harm to the employment relationship is a *necessary* element of a § 510 claim—but neither those cases nor any others support the argument that it is a *sufficient* element. *See, e.g., Zipf v. American Tel. & Tel. Co.*, 799 F.2d 889, 893 (3d Cir. 1986) ("employee in a Section 510 suit needs to establish that at the time of the alleged violation, he or she had the potential of receiving benefits").

6 The cases plaintiffs say [at 12, 22-23] "articulate the principles of standing applied below" all involved persons who—

The Court has repeatedly admonished that the lower courts should not create "equitable" exceptions to ERISA's express statutory framework. *Patterson*, 112 S. Ct. at 2250; *Guidry v. Sheet Metal Workers Pension Fund*, 493 U.S. 365, 376 (1990). " 'If exceptions to this policy [of protecting benefits] are to be made, it is for Congress to undertake that task.' " *Patterson*, 112 S. Ct. at 2250 (quoting *Guidry*, 493 U.S. at 376).

By judicially expanding ERISA to allow damage suits by former employees who have received all their accrued benefits, the Fifth Circuit has substituted its judgment for that of Congress—and threatened the benefits available to actual "participants" by subjecting pension plans to potentially ruinous suits by persons whom Congress never authorized to sue.

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unlike plaintiffs here—had *not* yet received all their accrued benefits or had been deprived of the opportunity to fulfill "eligibility requirements . . . in the future," *Firestone*, 489 U.S. at 117-18—and not merely the ability to accrue more benefits under a plan whose eligibility requirements they had already met. *See* Mobil Pet. at 15 & n.7.

Plaintiffs also misrepresent [at 22-23] that the Third Circuit in *Saporito v. Combustion Eng'g, Inc.*, No. 87-5144 (3d Cir. June 29, 1989), "reaffirmed an even broader principle." The quoted portion of the slip opinion simply quoted the court's earlier decision—which this Court vacated—to explain the case's procedural history. *Id.*, slip op. at 3-4 n.1. Following this Court's remand, the Third Circuit in turn remanded to the district court, and did not rule on the standing issue. *Id.* at 5.

CONCLUSION

The petition for a writ of certiorari should therefore be granted.

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